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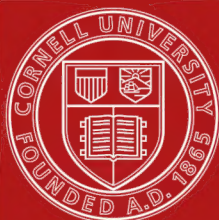
A treatise on the admissibility of parol



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A TREATISE ON THE ADMISSIBILITY  
OF PAROL EVIDENCE IN RESPECT  
TO WRITTEN INSTRUMENTS

By

IRVING BROWNE

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## PREFACE.

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THE purpose to prepare this treatise was formed more than twenty years ago, and some parts of it were written many years ago. The idea of writing such a work grew out of the costly suffering of one of the author's clients by reason of judicial ignorance of an exceedingly elementary doctrine of this branch of law, and the work has grown up gradually from subsequent practical experience and from the editorial reading and research of the last fourteen years.

It is not a little singular that in the flood of modern text-books none have been written upon this topic, in regard to which questions arise in every lawyer's every-day practice. Until now no attempt at a distinct, comprehensive and thorough treatment of the subject has ever been made. To ascertain the law the practitioner has been obliged to search a great variety of books. The text-books examined in the preparation of these pages would form a respectable working library. Even in the digests there has been no thorough grouping of the decisions under one head. The writers on evidence have done no more than devote a few paragraphs to the topic, the most extensive treatment by any of this class of authors being that of Mr. Frank S. Rice, in his recent work, in which are to be found some seventy-five consecutive but coarsely-printed pages on the topic, considerably taken up with the titles of cases, and much in the nature of a digest. Decidedly the best treatment it has ever received is at the hands of Mr. Dwight Arven Jones, in his most excellent work on "The Construction of Commercial and Trade Contracts," in which the author devotes two hundred pages to the subject, but the treatment is necessarily limited to its applicability to the special branch of commercial agreements. A glance at the table of cases in the present volume will reveal the largeness of the general subject, and every lawyer's experience will cause him to wonder, if he chances to think about it, why it has never before formed the basis of a distinct commentary.

It has been the author's chief purpose to furnish a practical book for busy practitioners, in which, without tedious searching, they can find the law stated clearly and succinctly, accompanied by suitable illustrations from the reports, *pro* and *con*, with sufficient quotations from the judicial opinions, and with a few leading cases on disputed points set forth in such fullness as to dispense with the necessity of resort to the original reports, frequently inaccessible, and to enable the commentary to stand upon its own footing. A secondary purpose has been to furnish a text-book fit for scholars and teachers. In a word, the work may be defined as an attempt at a code of parol evidence, accompanied by abundant illustrations.

The author has uniformly stated the law as he conceives it to be declared by the volume (if not the weight) of authority, but where his own opinion differs therefrom he has ventured to express it. In every case of conflict, he has endeavored thus to set forth the rule of the courts, without any attempt to fortify his own opinion by partial or uncandid representation of the authorities.

The author believes that he has personally examined every case cited; and while he has generally been content with stating the substance in his own language, yet in a few instances of leading importance and strenuous dispute he has given the opinions substantially in full, and has very frequently quoted liberally from the language of the judges in other instances. Quotations have uniformly been indicated by the proper sign, so that the reader will have no difficulty in distinguishing the statements and views of the writer from the judgments of the courts—the author from the authorities.

The author is *not* “conscious of errors and omissions”—as the prefatory phrase in that case made and provided frequently runs—for if he were he would certainly correct them. But errors and omissions must needs come, and the author will be, not glad, but still thankful, to have them pointed out. It is said that one must build one or two houses before he can frame one exactly to suit himself, to say nothing of other people; and this may be true of the writing of law books. One thing seems certain—that a conscientious author can never at first get his work exactly to satisfy his own ideal, although he may not be able to tell where the faults lie, just as a man with a toothache may not be able to point out the exact seat of the pain.

In the perusal of the following pages the scholar will be glad



to observe that in recent years there has been a general tendency to relax the old dogmas of parol evidence, and to convert the law into a more convenient and rational instrument of justice. Especially is this true of incomplete agreements, of customs, and of wills, in respect to which the law has made sensible advances in the last half century. It is also noteworthy that the ancient distinction between patent ambiguities and latent ambiguities, founded on a scholastic refinement by Lord Bacon, and echoed parrot-like and senselessly followed by generations of modern judges, has been effectually done away.

The general subject of Evidence has grown much too large for proper handling as a whole, and in the future can be adequately treated only in separate treatises on distinct subdivisions. An excellent type of the ideal treatment may be found in Mr. Lawson's work on "Presumptive Evidence." If the reception of the present work is such as to convince the author that he has any call to such an office, he may feel encouraged to follow this up with some similar treatise on some other subordinate branch of evidence.

The author acknowledges his indebtedness to several friends in the printing of this volume: to the Honorable David Dudley Field for suggestions and criticisms; to Mr. John T. Cook, of Albany, N. Y., a very competent and experienced editor, for direction to additional authorities; and especially to Mr. Adelbert Moot, of Buffalo, N. Y., a highly approved practitioner and an acknowledged expert on the subject of evidence, for his assistance in the reading of the proofs, and for exceedingly valuable suggestions both of a theoretical and a practical character.

IRVING BROWNE.

BUFFALO, N. Y.



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*Conditional delivery.*—Where a bond is not executed by all the persons named in it as obligors, parol evidence is admissible to prove that it was delivered to the obligee by some of the persons executing it upon the condition that the others named as obligors should also join in the execution, and the result of such evidence is to render the bond void as to those so executing it, and as to all others subsequently executing it, even without condition; but this rule does not apply to a bond perfect upon its face, nor to a bond not executed by all the obligors named therein, but delivered by those executing, not upon such express condition, but upon the mere faith that the others will execute it, 389-402.

*Mode of payment.*—Parol evidence is admissible to show an agreed mode of payment and discharge other than that specified in the bond, 402.

*Municipal bonds—impeachment.*—Parol evidence of failure to comply with statutory requirements is admissible to impeach municipal bonds, (1) in the hands of the original obligees; (2) in the hands of any subsequent holder taking them with knowledge or notice of such infirmity; (3) in the hands of innocent transferees for value and in good faith, unless the bonds contain recitals going to show that they were regularly issued, 403-408.

*Ratification.*—Parol evidence is admissible to show ratification by the municipality of bonds irregularly issued but not *ultra vires*, 408.

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*Res adjudicata—grounds of decision.*—On a plea of *res adjudicata*, evidence is admissible to show that a particular matter came in question and was under consideration, or the contrary, and to show the grounds of decision, 409-434.

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*Explanation of ambiguities.*—1. Where the object of a testator's bounty, or the subject of disposition, is described in terms applicable, indifferently, to more than one person or thing, for the purpose of ascertaining the beneficiary, identifying the thing bestowed, or determining the quantity of interest given, in a will, the court may inquire into every material fact relating to the claimant, the property claimed, and the circumstances and affairs of the testator and his family, and the claimant; and the testator's declarations before, at, or after the making of the will, are admissible in this view; but no evidence of mere mistake on the part of the testator or the draftsman is admissible. 2. A description partly false may be made operative by rejecting the false part, provided the remaining portion reasonably corresponds with the person, thing, or interest indicated by such extrinsic evidence; but no words can be added to any description, 435-483. Corroborative authorities, 439-471. Contrary authorities, 471-478. Time of declarations, 478-481. Intention, 481.

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A TREATISE ON THE ADMISSIBILITY  
OF PAROL EVIDENCE IN RESPECT  
TO WRITTEN INSTRUMENTS



# PAROL EVIDENCE.

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## CHAPTER I.

### INTRODUCTORY.

- SEC. 1. General rule excluding parol evidence.
2. Reasons for exceptions to the rule.
  3. Scope of this treatise.
  4. Codifications of the subject.

#### **Sec. 1. General rule excluding parol evidence.**

There are few rules of the law so familiar, so well settled and so frequently applied as this:

Parol evidence is inadmissible to contradict or vary the terms of a written contract.

*Authorities for this rule:* When parties have chosen to put their agreement in writing, the paper constitutes the best evidence of the agreement, and the parties thus make it their witness to speak the concurrence of their minds. "The law will not make nor permit to be made for parties a contract other than that which they have made for themselves."

"Men are taken to mean what they have chosen to say deliberately and in a permanent form, rather than what they may have said in hasty and less considered discourse. Hence the general rule that evidence of an oral agreement is not admissible to contradict the terms of a written document."<sup>1</sup>

The most elegant of all law writers has said: "To admit oral evidence as a substitute for instruments to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose

<sup>1</sup> Pollock Cont. (Wald.), 438.

recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend on the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices.”<sup>1</sup>

So one of the greatest of American jurists has said: “The true meaning of the rule excluding parol evidence is, that such evidence shall never be received to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning that the words upon any construction will admit or convey.”<sup>2</sup>

“Other terms can never be substituted for those which the parties have used, and parol evidence can under no circumstances contradict that language of a written contract which expresses the mutual will of the parties.”<sup>3</sup>

“If the parties have reduced their contract and the whole of it to writing, and the instrument is free from ambiguity or uncertainty, the courts have universally applied the rule, and excluded parol evidence to vary the terms of the contract.”<sup>4</sup>

## Sec. 2. Reason for exceptions to the rule.

Yet this general rule is neither invariable nor inflexible, but adapts itself to the manifold and shifting exigencies of human affairs. The paper witness, to whose keeping the parties have entrusted the expression of their agreement, like human witnesses, is subject to a variety of tests. As the human witness is liable to be impeached or discredited, shown to be fraudulent, mistaken, or under compulsion or undue influence, or not to disclose the whole story or to tell it ambiguously, obscurely or unintelligently, and thus his testimony is subject to cross-examination, amplification, explanation, and total or partial discredit or contradiction, so in many instances, from the overpowering necessities of human

<sup>1</sup> Starkie Ev., 651.

<sup>2</sup> 1 Duer Ins., 176.

<sup>3</sup> Jones Interp. Cont. 74.

<sup>4</sup> Hubbard v. Marshall, 50 Wis. 322.

See also Marsh v. McNair, 99 N.Y. 176.

No. Am. Fire Ins. Co. v. Throop, 22 Mich. 146.

Rendell v. Harriman, 75 Me. 497.

Goss v. Ellison, 136 Mass. 503.

Wheeler, etc., Co. v. Laus, 62 Wis. 635.

McCormick v. Huse, 66 Ill. 315.

Brunhild v. Freeman, 77 N. C. 128.

Merriam v. Pine City L. Co., 23 Minn. 314.

Serviss v. Stockstill, 30 Ohio St. 419.

MacLeod v. Skiles, 81 Mo. 595; S. C. 51 Am. Rep. 254.



intercourse, the testimony of the paper witness is not to be taken absolutely and as the only warrant of belief, but is subject to a large number of conditions. The law takes into consideration the fact that most agreements are drawn up by unskilled persons, ignorant of the legal rules of construction, who very frequently do not embody the entire agreement or else express it vaguely or ambiguously;<sup>1</sup> and the fact that even where agreements are drawn up by legal experts, the same faults and defects are attributable, sometimes from insufficient instructions from the client, sometimes from error of the counsel himself. A great deal of judicial leniency should be and is extended to uninstructed persons, where experience has demonstrated that some of the wisest lawyers who have ever lived have not known enough to draw their own wills; for example, Lord St. Leonards, Charles O'Connor, and Samuel J. Tilden. It seems very difficult to write unambiguously even by inspiration. Thus the Revelator (Rev. xxii: 2), speaking of the "tree of life," says it "bare twelve manner of fruits and yielded her fruit every month." Parol evidence should be admissible to determine whether it bare all twelve kinds every month, or only one kind monthly. The body of the exceptional law that has thus sprung up is much larger than that of the corroborative law.

### **Sec. 3. Scope of this work.**

It is the purpose of this treatise, not to heap up authorities in support of the familiar and elementary principle announced above, but to array and explain the exceptions to the rule—to set forth the admissibility rather than the non-admissibility of parol evidence in respect to written instruments. The authorities corroborating the general rule will be chiefly considered only when they seem to constitute exceptions to the exceptions.

It is also not within the purpose of this work to treat of the admissibility of parol evidence in respect to instruments under the statute of frauds.

### **Sec. 4. Codifications of this subject.**

There have been two recent private codifications of the exceptions to the rule excluding parol evidence. The more celebrated is that by Sir James Fitz James Stephen, forming a part of his *Digest of Evidence*. His provisions are as follows:

<sup>1</sup> "A large proportion of business contracts, involving vast sums of money, are made upon the signing of a mere memorandum." (Jones Const. Cont., § 130.)

## "ARTICLE 90.

"When any judgment of any court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.

"Provided that any of the following matters may be proved :

"(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.

"(2) The existence of any separate oral agreement as to any matter in which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them.

"(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.

"(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the statute of frauds, or otherwise.

"(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description ; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.

"Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.

“Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.

“The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted in it.

“ARTICLE 91.

“(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

“(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical and provincial expressions, of abbreviations and of common words which, from the context, appear to have been used in a peculiar sense; but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.

“(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.

“(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Such facts are hereinafter called the circumstances of the case.

“(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.

“(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.

“(7) If the document applies in part but not with accuracy to the circumstances of the case, the court may draw inferences from

those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular places or things.

“(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.

“(9) If the document is of such a nature that the court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.

#### “ARTICLE 92.

“Articles 90 and 91 apply only to parties to documents, and to their representatives in interest, and only to cases in which some civil right or civil liability dependent upon the terms of a document is in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.”

In the proposed Code of Evidence for the State of New York, it is provided (secs. 153, 159-162, 166, 167, 168):

“When an agreement has been reduced to writing by the parties, it is to be considered as containing all the terms of the agreement, and there can be, between the parties and their representatives or successors in interest, no evidence of such terms other than the contents of the writing, nor can there be any evidence to vary or contradict them, except to prove the facts mentioned in sub-divisions one, two, three, four and five of this section:

“1. Fraud, duress, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly

dated, want or failure of consideration, or mistake in fact, or any other matter which if proved would affect the validity of the writing, or some part of it, or which would entitle any person to a judgment or order in relation thereto;

“2. The existence of any separate oral agreement respecting a matter on which the writing is silent, and which is not inconsistent with its terms, if from the circumstances of the case it appears that the parties did not intend the writing to be a complete and final statement of the whole of the transactions between them;

“3. The existence of a separate oral agreement, constituting a condition precedent to the attaching of any obligation under the writing;

“4. The existence of a distinct subsequent oral agreement to rescind or modify such writing, if such agreement is not invalid under the statute of frauds;

“5. Any usage or custom by which incidents not expressly mentioned in the writing are annexed to contracts of that description; unless the annexing of such incidents would be repugnant to or inconsistent with the express terms of the contract.

“6. Oral evidence of a transaction is not excluded by the fact that a memorandum of it was made, if the memorandum was not intended to take effect as a legal contract.

“7. Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a writing, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.

“§ 159. When the language used in writing is plain in itself and applies accurately to existing facts, evidence is not relevant to show that it was not intended to apply to such facts.

“§ 160. When the language used in a writing is plain in itself, but is unmeaning in reference to existing facts, evidence is relevant to show that it was used in a peculiar sense.

“§ 161. When the facts are such that the language used might have been intended to apply to any one, and could not have been intended to apply to more than one, of several persons or things, evidence is relevant to show to which of those persons or things it was intended to apply.

“§ 162. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the

whole of it does not apply correctly to either, evidence is relevant to show to which it was intended to apply.

“§ 166. For the proper construction of a writing, the circumstances under which it was made, including the situation of the subject of the writing, and of the parties to it, may be shown, so that the court may be placed in the position of those whose language it is to interpret.

“§ 167. The terms of a writing are presumed to have been used in their ordinary meaning, but evidence to show that they have a local, technical or peculiar meaning, and were so used and understood in the particular instance, is relevant, and in that case the agreement must be construed accordingly ; but evidence is not relevant to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.

“§ 168. When the characters used in a writing are difficult to be deciphered, or the language of the writing is not understood, the evidence of a person skilled in deciphering the characters, or who understands the language, is relevant to explain the characters, or the meaning of the language.”

These latter rules seem to a considerable degree derived from those of Sir James Fitzjames Stephen, but are much more concise and on the whole are better expressed. It will be observed that to the first sub-division Stephen adds mistake of law as a ground of admission, which might judiciously have been adopted in the New York scheme. As a general statement of the admissibility of parol evidence these proposed rules seem excellent.

In addition to these two digests, there is the very celebrated work of Vice-Chancellor Wigram on Extrinsic Evidence in respect to Wills, in which he stated the law under several propositions or rules, illustrating them by a copious treatment of the cases. This treatise has become a classic, and has afforded a model to many subsequent law-writers. Wigram's rules will be given in full in the chapter on Wills.

My indebtedness to these three sources will be evident to the reader ; but I have endeavored to profit by them all, to lay down more detailed propositions, except in regard to wills ; to add all the ancient and modern illustrations of prominent value, and thus to adapt the discussion at once to the practical and sudden needs of the practitioner and the leisurely research of the student.

Mr. Austin Abbott lays down the following general rules for the admission of parol evidence (Trial Ev.):

“1. Where the action is not between the parties to the instrument, nor those claiming under or in priority with them.

“2. Where the object of the evidence is to impeach the validity of the instrument, or any part of it.

“3. Where the object of the evidence is to establish a separate oral agreement constituting a condition precedent to the existence of an obligation claimed to arise on the instrument.

“4. Where the object of the evidence is simply to show the surrounding circumstances of the parties, and of the subject of the contract, and the usages of language under which the instrument was written, in order to enable the court to read the instrument with the same knowledge with which the parties wrote it.

“5. Where the language of the instrument leaves its meaning doubtful, or extrinsic facts in evidence raise a doubt in respect to its application.

“6. Where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement on a matter as to which the instrument is silent, and which is not contrary to their terms, nor to their legal effect.

“7. Where the object of the evidence is to show a usage legally affecting the parties, by which incidents not expressly mentioned in such contracts are annexed to or implied in them, if the usage be not repugnant either to the express terms or the legal effect of the contract.

“8. To show, if the contract be unsealed, that it was made for the benefit and on behalf of the party suing or sued upon it, even though he be not named in it; or if it be sealed, that it was so made, and has been duly ratified by such party.

“9. To show that the date was erroneous.

“10. To show that the consideration was different from that stated (except for the purpose of defeating the instrument), or that it was not paid, though payment was acknowledged.

“11. To show that a transfer absolute on its face was given as security or in trust.

“12. To show the mistake which caused a repugnancy appearing on the face of the instrument.

“13. Where the object of the evidence is to show a *subsequent*

valid agreement to rescind, modify, extend or waive the contract or any provision of it."

Mr. Charles Chamberlayne, in his notes to Best on Evidence (p. 229, Am. ed. 1883), lays down the following "Parol Evidence Rule":

"Parol evidence is inadmissible to control or contradict the ascertained purport of any document under seal, or other valid written instrument of a solemn and conclusive nature, in any suit founded upon such instrument, and between the parties or privies thereto. \* \* \* The instrument, therefore, is conclusive as to the point which it covers. As a natural consequence the rule does not apply to third persons or to suits between one party and a stranger. For this reason also, all anterior and contemporaneous stipulations and representations are merged in the writing and cannot be given in evidence. So no evidence of conversations leading to a contract is admissible. It follows that if the instrument was not in point of fact intended to fairly represent the intent and whole agreement of the parties, the rule as above stated does not apply, \* \* \* it follows that any evidence is admissible which may form in law or equity ground of relief against the operation of the instrument, though the effect, and indeed the object, of such evidence is to contradict such instrument. Thus (1) evidence is admissible to show that an instrument was procured or influenced by fraud or misrepresentation. (2) Or by duress. (3) Or was executed for purposes forbidden by law. (4) Or was executed by a person legally incapable, at the time, of incurring legal liability, by reason of some incapacity, natural or superinduced, or by operation of law. (5) So also in cases where the active aid of a court of equity is invoked with regard to a written agreement, evidence will be received that such agreement was founded upon a mistake of material facts. But mistake in law not being ground for equitable relief, evidence of such mistake will not be received to vary or control the effect of a written instrument. Parol evidence will be received to show that a deed *prima facie* absolute is in reality a trust on a mortgage. (6) So it may be shown that the instrument was always inchoate or conditional; that it was at no time freely and finally delivered to the plaintiff by the party charged, in accordance with its apparent tenor. (7) So also parol evidence is admissible to prove that a written instrument or part thereof, has been discharged. (8) Or that a new agreement has been substituted by consent of the



parties, \* \* \* the language to be read is to be read in the light of all the surrounding circumstances, it being obviously impossible to tell what a man has *said*, until it is ascertained what he has *meant to say*. Any relevant evidence, therefore, which fairly partakes of the nature of *explanation*, or is reasonably calculated to place the court in the situation of the parties at the time of execution will in general be received. (1) Thus evidence may be given of technical or peculiar usage in order to qualify or explain the language, signs, or abbreviations employed by the parties. (2) So the condition, nature and qualities of the subject matter of a statement or agreement may be shown by parol evidence. Such evidence is obviously necessary to identify the subject-matter, or to identify the persons affected by the document. (3) So evidence of any custom or usage—business or otherwise—in reference to which the parties may fairly be supposed to have contracted, is admissible to explain or supplement their language. It is of course possible at all times to prove by parol the existence of a paper as a fact, in all cases where its contents are not material to the rights of the parties, or where the party proving it does not seek to avail himself of the contents as proof of any fact stated in it, or of any obligation created or discharged by it.”

It may be useful to contrast these modern rules with those laid down by an ancient writer, as for example Bacon in his *Abridgment*, who says:

“It seems to have been agreed as a general rule, even before the statute of frauds and perjuries, that no parol evidence could be admitted to control what appeared on the face of a deed or will, not only from the danger of perjury, but from a presumption that whatever the parties at the time had in contemplation was all reduced into writing. But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and evidence to inform the conscience of the court, viz.: that in the first no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence. Also to ascertain a fact, parol evidence hath been admitted to explain the intent of a testator. \* \* \* It hath also been admitted in equity to prove a variation between the agreement executed and the agreement intended, upon a sugges-

tion that such variance hath happened through mistake, fraud, etc. So if a deed intended to be a mortgage is by mistake and accident made an absolute deed, chancery will treat it as a mortgage, and parol evidence is admissible to show the mistake. So parol evidence is admissible to show whether a thing be parcel or not of the estate demised by a deed. So to show that persons describing themselves in a certificate as officers of the parish at large, were the officers of the hamlet where the pauper was settled. In explanation of mercantile contracts it is every day's practice to resort to it. Parol evidence may be admitted to explain a written instrument which on the face of it appears equivocal. Where an agreement on unstamped paper has been lost or destroyed, no parol evidence can be given of its contents. Although parol evidence may be received to explain, yet it can never be admitted to annul or substantially to vary a written instrument. In no case can evidence of a parol communication between the parties be received, to add a term not inserted in the specific agreement which they have executed; for what has passed between them may have been altered and shifted in a variety of ways, but what they have signed and sealed was fully settled. And my Lord Thurlow laid it down as a rule of law which it was impossible to break in upon, that nothing could be added to the written agreement, unless in cases where there is a clear subsequent independent agreement varying the former, not where it is of matter passing at the same time with the written agreement. Cotemporary and continuing usage may be given in evidence to explain doubtful words in old instruments."

## CHAPTER II.

## PRIMARY RULES.

- Sec. 5.** Existence of writing.
6. Exclusion applied solely to agreements.
  7. Lost instrument.
  8. Ownership of personal property.
  9. Obscurities, peculiar characters and abbreviations.
  10. Uncommon words and phrases.
  11. Alterations.
  12. Date and delivery.
  13. Lack of statutory requirement in agreement not required to be in writing.
  14. Execution of paper not within the issue.
  15. Collateral documents.
  16. Rebutting equities and presumptions.
  17. Fact of public office.
  18. Legal relations of parties.
  19. Descriptions of personal property.
  20. Description partly incorrect.
  21. Loss of rights.
  22. Other writings.

There are some elementary, fundamental and familiar rules of parol evidence, which stand in very little need of corroboration or illustration by authorities, which it will be well to array in the beginning, for the sake of logical completeness. They are as follows:

**Sec. 5. Existence of writing.**

Parol evidence is competent to show the existence of a writing, and that it was intended as an agreement.

*Illustration:* Thus where two letters are sent in one envelope, the circumstances may be proved to show that the letters were intended to form an agreement.<sup>1</sup>

**Sec. 6. Writings which are not agreements.**

The exclusion of parol evidence applies strictly to matters of agreement, and not to writings which are not of the character of agreements.

<sup>1</sup> *Barney v. Forbes*, 118 N. Y. 580.  
Whart. Ev., § 931.

*Hotchkiss v. Mosher*, 48 N. Y. 485.

*Illustrations:* Thus, for example, a mere letter is always explainable by parol, for it is of the character of a bare admission. So the meaning of the words, in a letter, "arranged with the district attorney to drop case" were held explainable by parol.<sup>1</sup> Parol evidence is competent to show the contents of an application for insurance.<sup>2</sup> Parol evidence of the contents of a telegraphic dispatch, without showing its loss or destruction, or notice to produce it, is incompetent.<sup>3</sup> Not so where the original and the office from which it was sent are out of the jurisdiction.<sup>4</sup>

In *Commonwealth v. Pope*, 3 Dana, 418, parol evidence was held admissible, on the trial of an indictment for sending a challenge to fight a duel, to explain the words in a letter, "You will now afford me the satisfaction which is due from man to man." The court said: "This court cannot judicially know the technic of duellists; nor can we be presumed to possess a judicial knowledge respecting the accustomed etiquette and forms observed in negotiations preliminary to those belligerent interviews erroneously denominated affairs of honor. But we may presume that when the parties interchange written communications, if neither can be convicted unless *those documents* literally import a challenge or an acceptance to fight in single combat, with deadly weapons, the statute prohibiting the practice of duelling would become a mere *brutum fulmen*, without any practical efficacy whatsoever. The communications in writing constitute only one species of evidence of the fact that an unlawful challenge has been given or accepted; they may not constitute the whole, or the only, or even the most direct and explicit proof. They may, therefore, when they exist, be explained or applied or aided by oral evidence;" "oral proof as to what Pope intended or Prentice understood by it, would not be inconsistent with any rule of evidence or of common sense."

## Sec. 7. Lost instrument.

Parol evidence is admissible to prove the contents of

<sup>1</sup> *Smith v. Crego*, 54 Hun, 22.

*Foster v. Dickerson*, — Vt. —; 24 Atl. Rep. 453.

<sup>2</sup> *Williamson v. Cambridge R. Co.* 144 Mass. 148.

<sup>3</sup> *Cairo and St. Louis R. Co. v. Mahoney*, 82 Ill. 73; S. C. 25 Am. Rep. 299.  
*Smith v. Easton*, 54 Md. 138.  
*Howley v. Whipple*, 48 N. H. 487.

*Barons v. Brown*, 25 Kans. 410.

*Magie v. Hermon*, — Minn. —; 52 N. W. Rep. 910.

*Contra: Reliance Lumber Co. v. W. U. Tel. Co.* 58 Tex. 394; S. C. 44 Am. Rep. 620.

<sup>4</sup> *Whilden v. Merch. and Planters' Nat. Bk.* 64 Ala. 1; S. C. 38 Am. Rep. 1.

an instrument that has been lost or destroyed, or is not produced upon notice.<sup>1</sup>

And so, where the instrument is not lost, but is shown to be beyond the jurisdiction of the court.<sup>2</sup>

But not without proof of an effort to obtain the paper.<sup>3</sup>

Where a party refuses to produce the instrument on notice, he is bound by the other's parol proof of its contents.

## **Sec. 8. Ownership of personal property.**

Parol evidence is competent to establish ownership of personal property, although the owner acquired title by virtue of a written instrument still existing.<sup>4</sup>

And so defendant, in an action of detinue, may prove by parol evidence that he never had possession, although he has introduced a written agreement of sale to himself.<sup>5</sup>

## **Sec. 9. Obscurities and peculiarities.**

An obscurity in the handwriting, whether from age, accident or the character of the hand itself, may be solved by a resort to parol and opinion evidence, and the same is true of peculiar characters and abbreviations.

*Illustrations:* Thus in *Dresler v. Hard*, 127 N. Y. 235, the opinion of an expert was admitted to show whether "Juy" in the date of a receipt stood for Jan. or July. So in *Sheldon v. Benham*, 4 Hill, 131, an expert was allowed to testify to the meaning of certain characters and abbreviations in entries made by a deceased officer of a bank. So in *Armstrong v. Burrows*, 6 Watts, 266, such evidence was allowed to determine whether a date was 1823 or 1824. In *Vinton v. Peck*, 14 Mich. 287, an expert engraver was allowed to testify whether a figure had been altered from "8" to "80." In *Norman v. Morrell*, 4 Vesey, 770, parol evidence was allowed, to show whether a figure was 8 or 3, and in *Stone v. Hubbard*, 7 Cush. 595, to determine whether a figure was 4 or 2.

Parol evidence is competent to prove what was intended by blotted and illegible or obscure figures. "If the writing cannot

<sup>1</sup> *Stebbins v. Duncan*, 108 U. S. 32.

<sup>2</sup> *Manning v. Maroney*, 87 Ala. 563; S. C. 13 Am. St. Rep. 67.

<sup>3</sup> *Wiseman v. No. Pac. R. Co.* 20 Oreg. 425; S. C. 23 Am. St. Rep. 135.

<sup>4</sup> *Gallagher v. London Assur. Corp.* — Pa. St. —.

<sup>5</sup> *Burns v. Morrison*, — W. Va. —; S. E. Rep. 62.

be read, the defendant is not entitled to its obscurity any more than the plaintiff."<sup>1</sup>

### Sec. 10. Technical expressions.

Parol evidence is admissible to explain the meaning of words and phrases not in common use, such as foreign, obsolete, scientific, abbreviated, or technical expressions.

*Illustrations* : As for example, "C. O. D.," "f. o. b.," "mod." So of "cold storage." *Behrman v. Linde*, 47 Hun, 530. "Square-inch of water." *Jonesville Cotton Mills v. Ford*, Wis. 52 N. W. Rep. 764.<sup>2</sup>

### Sec. 11. Alterations.

Parol evidence is competent to explain or show alterations.<sup>3</sup>

### Sec. 12. Date and delivery.

The true date of any instrument may be shown by parol, without regard to the date recited, and the date of delivery may be shown although different from the date of the instrument.<sup>4</sup>

*Illustrations* : A mistake in the date of a letter may be corrected by parol evidence.<sup>5</sup> The time of delivery of a lease may

<sup>1</sup> *Walrath v. Whittekind*, 26 Kans. 482.

<sup>2</sup> See also *Arthur v. Roberts*, 60 Barb. 580.

*Silberman v. Clark*, 96 N. Y. 522.

*Callender v. Dinsmore*, 55 N. Y. 200.

*Page v. Cole*, 120 Mass. 37.

*Cooper v. Smith*, 15 East. 102.

*Whitney v. Boardman*, 118 Mass. 243.

*Hartwell v. Camman*, 10 N. J. Eq. 128.

*Smith v. Clayton*, 29 N. J. L. 357.

*Armstrong v. Burrows*, 6 Watts, 266.

*Farmers & Mechanics' Bank v. Day*, 13 Vt. 36.

*Hatch v. Douglas*, 48 Conn. 116.

*Fenderson v. Owen*, 54 Me. 372.

*Busch v. Pollock*, 41 Mich. 64.

*Shackleford v. Hooker*, 54 Miss. 716.

*Barlow v. Lambert*, 28 Ala. 704.

*Callahan v. Stanley*, 57 Cal. 476.

*Whart. Cont.*, § 634.

2 Phill. Ev. 709.

*Miller v. Burke*, 68 N. Y. 615.

*Partridge v. Ins. Co.*, 15 Wall. 573.

*Casler v. Conn. M. L. Ins. Co.*, 22 N. Y. 427.

*Mansfield R. Co. v. Veeder*, 17 Ohio 385.

<sup>3</sup> 1 Greenl. Ev., § 564

*Neil v. Case*, 25 Kans. 510; S. C. 38 Am. Rep. 259 and note 260.

<sup>4</sup> *Shaughnessey v. Lewis*, 130 Mass. 355.

*Russell v. Carr*, 38 Ga. 459.

*Paige v. Carter*, 64 Cal. 489.

*Germania Bank v. Distler*, 64 N. Y. 642.

*Perry v. Smith*, 34 Tex. 277.

*Abrams v. Pomeroy*, 13 Ill. 133.

*Barnet v. Abbott*, 53 Vt. 120.

*Hartsell v. Myers*, 57 Miss. 135.

*Reffell v. Reffell*, L. R., 1 P. & D. 139.

*Steele v. Mart*, 4 B. & C. 272.

*Cooper v. Robinson*, 10 M. & W. 694.

*Hall v. Cazenove*, 4 East. 477.

1 Greenl. Ev., §§ 285, 305.

*Pascault v. Cochran*, 34 Fed. Rep. 358.

<sup>5</sup> *Stockham v. Stockham*, 32 Md. 196.

be shown although it differs from the date of the lease.<sup>1</sup> So of a deed or mortgage.<sup>2</sup> Omitted dates may be supplied and wrong dates corrected by parol.<sup>3</sup>

### Sec. 13. Irregular instruments not necessarily in writing.

Where a contract is one not required by the law to be in writing, and is inadmissible in evidence for lack of some statutory requirement, parol evidence of the contract may be given.

*Illustrations:* Thus in *Leach v. Hale*, 31 Iowa, 69; S. C. 7 Am. Rep. 112, where a bank issued a certificate of deposit, on receipt for money deposited, and the proper United States revenue stamp was not affixed, parol evidence of the deposit was received. The same was held in *McAfferty v. Hale*, 24 Iowa, 355. The court there said: "The writing itself cannot be used as an instrument of evidence, but the original contract remains unaffected, and if by the rules of law it is such as may be shown by parol, the attempt to reduce it to writing will not exclude the evidence." Citing *Brown v. Watts*, 1 Taunt. 353; *Wilson v. Kennedy*, 1 Esp. 245; *Alves v. Hodgson*, 7 T. R. 241; *Wade v. Beasley*, 4 Esp. 7.

*Contrary doctrine:* There is an *obiter dictum* to the contrary in *Reed v. Wood*, 9 Vt. 287. In *Rolleston v. Hibbert*, 3 T. R. 406, there was a bill of sale of a ship, not containing the certificate of the registry, which defect rendered it void by statute. Kenyon, L. C., J., said: "It was first contended that it is not necessary that the property in a ship shall pass by a written instrument. On that point I give no opinion, because it is not necessary. But certainly if the parties choose to convey by a written instrument that shows what the intentions and rights of the parties are, and they shall not afterwards be permitted to refer to any other agreement. For if a person execute a bill of sale of goods without stamp, such an instrument cannot be received in evidence, and yet the vendee cannot resort to any parol evidence of the agreement. So here the title of the defendants being reduced to writing, they cannot refer to any other

<sup>1</sup> *Steele v. Mart*, 4 B. & C. 272.

<sup>2</sup> *Moody v. Hamilton*, 22 Fla. 298.

*Bruce v. Slemp*, 82 Va. 352.

<sup>3</sup> *Burditt v. Hunt*, 25 Me. 419; S. C. 43 Am. Dec. 289.

*Biggs v. Piper*, 86 Tenn. 589.

agreement, even though the written instrument be void by the act."

#### **Sec. 14. Collateral instruments.**

When the contents of a paper are not involved in the issue its execution may be proved as an independent fact, without production of the instrument.

"In cases where the written communication or agreement between the parties is collateral to the question in issue, it need not be produced."<sup>1</sup>

#### **Sec. 15. Collateral instrument—form.**

When papers or documents are introduced collaterally in the trial of a cause, the purpose and object for which, and the reason why they were made in the particular form, may be explained by parol.

"Such evidence," says Bradley, J., in *Bank v. Kennedy*, 17 Wall. 19, "does not in the least vary or contradict the drafts themselves. As the form of the drafts might confuse the jury, the plaintiffs had a clear right to explain how they came to be made as they were. The fact in question was the loan."<sup>2</sup>

#### **Sec. 16. Rebuttal of equity or presumption.**

Parol evidence is admissible to "rebut an equity," or a presumption.

*Illustrations:* As to rebut the presumption that an estate is situated where a contract to convey it is dated.<sup>3</sup> That a judgment against an indorser passes by assignment of a judgment against the principal.<sup>4</sup> That only one legacy was intended when two are given in the same will.<sup>5</sup> That a posted letter was received.<sup>6</sup> To show the abandonment of an easement.<sup>7</sup> But not

<sup>1</sup> *Exrs. of Shoenberger v. Hackman*, 37

Pa. St. 87,

1 Greenl. Ev. § 89.

*Bayne v. Stone*, 4 Esp. 13.

*Tucker v. Welsh*, 17 Mass. 160.

*M'Fadden v. Kingsbury*, 11 Wend. 667

*Southwick v. Stevens*, 10 Johns. 443.

*Bank v. Kennedy*, 17 Wall. 19.

*Klein v. Russell*, 19 Wall. 433, 464.

*Wollner v. Lehman*, 85 Ala. 274.

*Daniels v. Smith*, 130 N. Y. 696.

<sup>9</sup> *Faulcon v. Johnston*, 102 N. C. 264 ;

S. C. 11 Am. St. Rep. 737.

<sup>3</sup> *Mead v. Parker*, 115 Mass. 413 ; S. C. 15 Am. Rep. 110.

<sup>4</sup> *Bank v. Fordyce*, 9 Pa. St. 275.

<sup>5</sup> *Hurst v. Beach*, 5 Madd. 351.

<sup>6</sup> *Austin v. Holland*, 69 N. Y. 571 ; S. C. 25 Am. Rep. 246.

*Oregon Steamship Co. v. Otis*, 100 N. Y. 446 ; S. C. 53 Am. Rep. 221.

*Huntley v. Whittier*, 105 Mass. 391 ; S. C. 7 Am. Rep. 536.

<sup>7</sup> *Fitzpatrick v. Boston & Me. R. Co.*, 84 Me. 37.



to rebut the presumption that a legacy to a creditor is not intended as payment.<sup>1</sup> Nor may a mortgage be rendered available as security for future advances or responsibilities, by subsequent parol agreement, as against a junior incumbrancer.<sup>2</sup>

### Sec. 17. Public office.

The fact that a person holds and exercises a public office may be shown by parol, without producing his commission or written authority.<sup>3</sup>

### Sec. 18. Legal relations.

A legal relation between parties may be shown by third parties by parol, although the relation is established by a writing.

*Illustration:* Thus the fact of partnership is provable by parol, although there are written articles.<sup>4</sup> So to prove a settlement, occupation and payment of rent may be shown by parol, although the contract is in writing.<sup>5</sup>

### Sec. 19. Descriptions of personalty.

Vague descriptions of personal property may be made certain by parol.<sup>6</sup>

*Illustrations:* As in a chattel mortgage, the goods only described as "now in store occupied," etc.<sup>7</sup> And live stock described only by number in a deed of trust.<sup>8</sup> Where there was a mortgage of "one portable saw-mill," evidence was admitted to show whether the mortgage covered a steam-engine used in connection with it.<sup>9</sup> So to explain the word "team."<sup>10</sup>

### Sec. 20. Description partly incorrect.

Where part of a description is false or incorrect, it may be rejected, if enough is left to identify the subject of the description.

<sup>1</sup> Reynolds v. Robinson, 82 N. Y. 103.

Phillips v. McCombs, 53 N. Y. 494.

<sup>2</sup> Truscott v. King, 6 N. Y. 161.

<sup>3</sup> Com. v. Kane, 108 Mass. 423.

Colton v. Beardsley, 38 Barb. 29.

Lucier v. Pierce, 60 N. H. 13.

Golder v. Bressler, 105 Ill. 428.

Chapman Township v. Herrold, 58 Pa. St. 106.

<sup>4</sup> Widdifield v. Widdifield, 2 Binney, 245

Cutler v. Thomas, 25 Vt. 73.

Alderson v. Clay, 1 Stark, 327.

<sup>5</sup> R. v. Holy Trinity, 7 B. & C. 611.

<sup>6</sup> Thomas Chat. Mortg., § 119.

Galen v. Brown, 22 N. Y. 37.

<sup>7</sup> Burditt v. Hunt, 25 Me. 419; S. C. 43 Am. Dec. 289.

<sup>8</sup> Barker v. Wheelip, 5 Humph. 329; S. C. 42 Am. Dec. 433.

<sup>9</sup> Weber v. Illing, 66 Wis. 79.

<sup>10</sup> Thurber v. Minturn, 62 How. Pr. 27.

This is the familiar maxim, *falsa demonstratio non nocet*. It has its most frequent application in respect to wills and deeds, and in the chapter on those subjects sufficient examples will be given for illustration of its force in all circumstances.

### **Sec. 21. Loss of rights.**

The loss of certain rights acquired under a writing may be shown by parol.

*Illustration:* As for example, the abandonment of an easement.

### **Sec. 22. Other writings.**

Other writings between the parties relative to the same subject matter are admissible to explain or qualify the agreement before the court.<sup>1</sup>

<sup>1</sup> 1 Greenl. Ev., § 283.

Wilson v. Randall, 67 N. Y. 338.

## CHAPTER III.

## PARTIES.

## SEC. 23. Identification.

- 24. Agency—unsealed contract—undisclosed principal—ratification.
- 25. Agency—agent bound.
- 26. Agency—sealed contract—undisclosed principal.
- 26. Agency—signing apparently as principal.

**Sec. 23. Identification.**

Parol evidence is admissible to identify the parties to a contract.

“One of the first uses of parol evidence is to identify parties who have signed a contract.”<sup>1</sup>

*Illustrations:* As where a grant was made to a married woman in her maiden name, to show that she was the person intended, that she was thus known to the grantor, and that there was no other bearing that name or claiming the title.<sup>2</sup> To show that a note payable to “the president, directors and company” of a certain corporation was intended to be payable to the corporation.<sup>3</sup> To show that Elias Wicks named in a patent was the same person who afterwards conveyed the premises under the name of Eli Wicks.<sup>4</sup> To show that a grant to Alfred Brown was intended for Alfred Bowen.<sup>5</sup> To show, in a suit on a due-bill for “labor performed on cottage lot of railroad company,” whether the labor was for the company or the president personally.<sup>6</sup> To show that a written order or letter of credit addressed to W. W. was intended for W. W. & Co.<sup>7</sup> To show the payee intended in a sealed promise to pay naming no payee.<sup>8</sup> To ascertain the

<sup>1</sup> Trueman v. Loder, 11 Ad. & Ell. 589.

<sup>2</sup> Scanlan v. Wright, 13 Pick. 523.

<sup>3</sup> Newport etc. Co. v. Starbird, 10 N. H. 123; S. C. 34 Am. Dec. 145.

To the same effect, Porter v. Pierce, 22 N. H. 275; S. C. 55 Am. Dec. 151.

<sup>4</sup> Henderson v. Hackney, 23 Ga. 383; S. C. 68 Am. Dec. 529.

<sup>5</sup> Bowen v. Slaughter, 92 Ga. 338; S. C. 71 Am. Dec. 135.

<sup>6</sup> Richmond, etc. R. Co. v. Snead, 19 Gratt. 354; S. C. 100 Am. Dec. 670.

<sup>7</sup> Wadsworth v. Allen, 8 Gratt. 174; S. C. 56 Am. Dec. 137.

<sup>8</sup> Barkley v. Tarrant, 20 S. C. 574; S. C. 47 Am. Rep. 853.

payee in an "I. O. U."<sup>1</sup> To ascertain the bank intended in an obligation payable to "A. B., cashier."<sup>2</sup> To show that a name in the place provided for the subscribing witness was that of the maker.<sup>3</sup> So it might be shown that he signed with a fictitious name.<sup>4</sup> So where a contract purported to be made by A. and was signed "A., agent," to show that A. was contracting for his wife, and that the plaintiff knew it.<sup>5</sup> So to show that a non-negotiable note signed by B. as apparent agent is the obligation of A.<sup>6</sup> So to show which of two executors signing a release of a mortgage had the money.<sup>7</sup> So to fill a blank in an insurance policy with the name of the insured.<sup>8</sup> So to show the *cestui que trust* of a deed to one as "trustee," without setting forth for whom.<sup>9</sup> So to show the real name of one who has signed an assumed name.<sup>10</sup> And to show who was the buyer and who was the seller.<sup>11</sup> So to show the real party in interest in an insurance policy.<sup>12</sup>

## Sec. 24. Agency — unsealed contract — undisclosed principal.

In order to hold an undisclosed principal, extraneous evidence is admissible to show that the signer of an unsealed contract acted only as agent, although the contract does not name the real principal, and purports to have been made by the agent for himself. This evidence may be of an authorization by a principal, or where there was no original authority for the execution of the contract by the professing agent, parol evidence is competent to show that with knowledge of all the facts he expressly or silently acquiesced, or accepted the benefits.<sup>13</sup>

<sup>1</sup> Kinney v. Flynn, 2 R. I. 319.

<sup>2</sup> Baldwin v. Bank of Newbury, 1 Wall. 234.

To the same effect, Musser v. Johnson, 42 Mo. 74; S. C. 97 Am. Dec. 316.

<sup>3</sup> Rape v. Westcott, 18 N. J. L. 245,

<sup>4</sup> Ibid.

<sup>5</sup> Kennedy v. McKay, 14 Vroom, 288; S. C. 39 Am. Rep. 581.

<sup>6</sup> Webster v. Wray, 19 Neb. 558; S. C. 56 Am. Rep. 754.

<sup>7</sup> McKim v. Aulbach, 130 Mass. 481; S. C. 39 Am. Rep. 470.

<sup>8</sup> Burrows v. Turner, 24 Wend. 276; S. C. 35 Am. Dec. 622.

<sup>9</sup> Railroad Co. v. Durant, 95 U. S. 576.

<sup>10</sup> Richardson's case, L. R. 19 Eq. 588.

<sup>11</sup> Newell v. Radford, L. R. 3 C. P. 52.

<sup>12</sup> Clinton v. Hope Ins. Co. 45 N. Y. 454.

<sup>13</sup> 2 Greenl. Ev. (13th ed.) § 65.

Salmon Falls Manf. Co. v. Goddard, 14 How. 453.

Higgins v. Senior, 8 M. & W. 834.

Waddill v. Sebree, — Va. — ; 14 S. E. Rep. 849.

*Illustrations:* 1. In *Trueman v. Loder*, 11 Ad. and Ell. 589, Lord Denman said: "If he," the principal, "is sued for the price, the contract is not varied by appearing to have been made by him in a name not his own." The same doctrine was reiterated in *Ford v. Williams*, 21 How. 287; *Rose v. Hayden*, 35 Kans. 106; S. C. 57 Am. Rep. 145 (the case of a resulting trust in lands); *Story Agency*, §§ 160a-270. In *Coleman v. First National Bank of Elmira*, 53 N. Y. 388, it is held that a certificate of deposit made by the president of a banking house in his own name, and certifying a deposit "in this office," may be shown by parol to have been intended to evidence a deposit with the house. The court said: "Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent."

2. So in *Nicoll v. Burke*, 78 N. Y. 580, parol evidence was approved, to show that an unsealed lease, signed "W. & E. A. C., as landlords," was executed by them as agents, and the principal thus empowered to recover rent upon it. "The principle is well settled," says the court, "that if the agent possesses the authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself as agent or not, or whether the principal be known or unknown, his principal may be made liable, and will be entitled to sue thereon in all cases," etc. Shaw, C. J., in *Huntington v. Knox*, 7 Cush. 371, says: "The doctrine proceeds on the ground that the principal and the agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority and for his account."<sup>1</sup>

*Contrary authority:* But this doctrine is denied in New Jersey, in *Schenck v. Spring Lake Imp. Co.*, 47 N. J. Eq. 44. The court distinguished the leading case of *Higgins v. Senior*, 8 M. & W. 834, on the ground that "the suit was not against an unnamed principal, but against the person who appeared on the face of the instrument to be personally a contracting party. The plaintiff made no attempt to hold any other person liable. But the defendant attempted to escape liability by showing, by parol evidence, that in making the contract on which he was sued he

<sup>1</sup> To the same effect: *Edwards v. Gold-*  
ing, 20 Vt. 30.  
*Calder v. Dobell*, L. R. 6 C. P. 486.

*Nutt v. Humphrey*, 32 Kans. 100.  
*Lerned v. Wannemacher*, 9 Allen, 419.

acted to the knowledge of the plaintiff as the agent of a third person. This it was held he could not do. But the question before the court, it will be seen, was not whether a person not a party to the contract could be made a party by oral evidence, but whether a person who was a party could discharge himself from liability by showing, by parol proof, that in making the contract he, to the knowledge of the plaintiff, did not act for himself but for a third person."

*As to notes.* In *Haile v. Peirce*, 32 Md. 327; S. C. 3 Am. Rep. 139, where a note was drawn, "we, the president and directors" of a company, and signed by them with their official designations, parol evidence was admitted to show that it was given and received as the note of the company. To this effect *Bean v. Pioneer Min. Co.*, 66 Cal. 451; S. C. 56 Am. Rep. 106. But otherwise of a note phrased "I promise," and signed as treasurer of a parish.<sup>1</sup> And a bill of sale, in form a complete contract, may not be varied by proof of agency.<sup>2</sup>

## Sec. 25.

But evidence that a contract, in the name of a principal, and signed apparently as agent, was intended as the contract of the signer alone, is inadmissible.<sup>3</sup>

*Illustrations:* 1. In *Artcher v. Douglass*, 5 Denio, 509, an action on a bond of indemnity to a sheriff for a levy, parol evidence was allowed for the purpose of showing that the defendants signed as sureties, and that the plaintiff in the execution had released the principal, and thus in law released them. The court observed: It is urged "that when both principal and surety unite in a joint obligation or agreement, which is silent as to the character of the parties, the surety cannot be allowed to show, at law, that he executed the obligation or entered into the agreement in that character. It must be admitted there are some authorities which countenance this position, and that, whether the obligation be created by a contract under a seal or without a seal. *Pitm. on Pr. and Surety*, 183, 184; *People v. Jansen*, 7 Johns. 337; *Rees v. Berrington*, 2 Ves. Jr. 542; *Hunt v. U. S.*, 1 Gall. 33; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet.

<sup>1</sup> *Sturdivant v. Hull*, 59 Me. 172; S. C. 8 Am. Rep. 409.

<sup>3</sup> *Heffron v. Pollard*, 73 Tex. 96; S. C. 15 Am. St. Rep. 764.

<sup>2</sup> *Bulwinkle v. Cramer*, 27 S. C. 376; S. C. 13 Am. St. Rep. 645.

266; 14 id. 201; *Ashbee v. Pidduck*, 1 M. & W. 564; *Pease v. Hirst*, 10 B. & C. 122; *Price v. Edmunds*, id. 578. But the authorities on this point are not harmonious, for there are several cases in which a defendant, sued with others on a joint contract, was allowed to show by parol evidence that he was surety for a co-defendant, and thus let in a defense founded on that relation. *Pain v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 id. 394; *Griffith v. Reed*, 21 Wend. 502; *Pitm. on Pr. and Surety*, 183; *Hall v. Wilcox*, 1 M. & Rob. 58; *Thompson v. Clubley*, 1 M. & W. 212; *Chit. on Bills*, ed. of 1839, pp. 563. The reason for excluding such evidence at law, when it is conceded to be admissible in equity, is hardly to be gathered from the books, and perhaps there is none better than the one glanced at in *Baker v. Briggs*, 8 Pick. 128, that the surety having bound himself by a joint contract with his principal, shall not be allowed to set up a defense peculiar to himself as surety, and which in its nature is wholly unavailable to the principal in the contract. We shall not enter into these vexed questions, for they are not in the case before us. Here the principal was not a party to the obligation on which this action was brought," etc.<sup>1</sup>

2. In *Northwestern Distilling Co. v. Brant*, 69 Ill. 658, S. C. 18 Am. Rep. 631, an agreement under seal, made by the president of a corporation, recited that it was made between "B. of the first part," and "E. L., president of the N. D. Company, of the second part." Throughout, the party of the second part was described as "he" or "him." It was subscribed "N. D. Co., by E. L., president." *Held*, upon parol proof, that it was a valid execution by the company, and it, and not L., was liable upon a covenant therein.

## Sec. 26. Agency—sealed instrument.

A contract under seal made by an agent will not bind the principal unless made in the name of the principal, and extrinsic evidence is inadmissible to show the principal.<sup>2</sup>

<sup>1</sup> See *Hubbard v. Gurney*, 64 N. Y. 457.  
*Paul v. Rider*, 58 N. H. 119.  
*Mansfield v. Edwards*, 136 Mass. 15.  
*Graves v. Johnson*, 48 Conn. 160; S.  
 C. 40 Am. Rep. 162.

<sup>2</sup> *Briggs v. Partridge*, 64 N. Y. 357.

*Providence v. Miller*, 11 R. I. 272; S.  
 C. 23 Am. Rep. 453.  
*Kiersted v. Orange, etc.*, R. Co., 69  
 N. Y. 343.  
*Schaefer v. Henkel*, 75 N. Y. 378.  
*Jackson v. Miller*, 6 Wend. 228.

*Illustrations:* This point was elaborately discussed in *Briggs v. Partridge*, 64 N. Y. 357, S. C. 21 Am. Rep. 617, where Andrews, J., observed:

"Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. *Beckham v. Drake*, 9 M. & W. 79; *Spencer v. Field*, 10 Wend. 88; *Townsend v. Hubbard*, 4 Hill, 351. In the case last cited, it was held that where an agent, duly authorized to enter into a sealed contract for the sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agents as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained. It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburt was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity. *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. and Ellis, 594; *Dykers v. Townsend*, 24 N. Y. 61; *Coleman v. First Nat. Bank of Elmira*, 53 id. 393; *Ford v. Williams*, 21 How. (U. S.) 289; *Huntington v. Knox*, 7 Cush. 371; *Eastern R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Whart. 91; *Browning v.*



Provincial Ins. Co., L. R., 5 P. C. 263; *Calder v. Dobell*, L. R., 6 C. P. 486; *Story on Agency*, secs. 148, 160.

"It is doubtless somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated with the qualification that it applied, when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent.

"That Hurlburt had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted, and if the contract had been a simple contract, and not a specialty, the defendant would, I think, have been bound by it within the authorities cited. \* \* \* \* \*

"We return then to the question originally stated. Can a contract under seal, made by an agent in his own name, for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal, but if the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in

the instrument, which may be resorted to to ascertain the terms of the agreement. *Randall v. Van Vechten*, 19 Johns. 60; *Dubois v. Del. and Hud. Canal Co.*, 4 Wend. 285; *Lawrence v. Taylor*, 5 Hill, 107; see, also, *Evans v. Wells*, 22 Wend. 324; *Worrall v. Munn*, 5 N. Y. 229; *Story on Agency*, sec. 277; 1 Am. Lead. Cas. 735, note.

"The plaintiff's agreement in this case was with Hurlburt and not with the defendant. The plaintiff has recourse against Hurlburt on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is declared by Shaw, C. J. in *Huntington v. Knox*, 7 Cush. 374: Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore if made by an attorney or agent, it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

### **Sec. 27. Agency—apparent principal.**

A contract binds the signer when he subscribes apparently as principal, and he may not introduce parol proof of his agency to evade his liability.

*Illustrations:* In *Bulwinkle v. Cramer*, 27 S. C. 376, this doctrine was laid down, the court observing: "But it is insisted, that while this may be so as to what may be called the terms of the

paper—the quality of the article, consideration, time of payment, etc.—yet parol testimony was admissible tending to show that the defendants Cramer & Blohme, in selling the corn, committed the agreement to writing, taking the note, and realizing upon it in their own name, were acting, not as the papers represented, but as agents of a house in Baltimore, and that the plaintiffs contracted with said house through Cramer & Blohme as their agents. Is not the signature to a contract in writing, showing who made it, and in what character, a part, and a very important part, of that contract? We are unable to see any good reason why this part should not be protected from alteration or addition, as well as any other part of the contract in writing. It seems to us that when the defendant signed the contract in their own names that became a part of it, and could not be altered by parol, so as to add to the signature, ‘as agents of Robert Turner & Son, of Baltimore.’ ‘A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name. \* \* \* If an agent selling goods as bought of him (the agent) he would be personally liable for a failure to deliver the goods.’ Story Ag. 269. See also *id.* 219; *Benj. Sales*, § 219; *Higgins v. Senior*, 8 Mees. & W. 834; *Nash v. Towne*, 5 Wall. 703, and *Jones v. Littledale*, 6 Ad. & El. 486, in which last case cited, Lord Chief Justice Denman said: ‘There is no doubt that evidence is admissible on behalf of one of the contracting parties to show that the other was agent only, though contracting in his own name, and so fix the real principal; but it is clear, that if the agent contracts in such a form as to make himself personally responsible, he cannot afterward, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds, until the invoice, by which the defendants represent themselves to be the sellers; and we think they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands and to prevent its being paid to their principals; but in so doing they have made themselves responsible,’ etc. In the case from Wallace, Mr. Justice Clifford said: ‘Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he

should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal, at the time the contract was executed. Where a simple contract other than a bill or note is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. 'Such evidence,' says Baron Parke, 'does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another;' and that principle has been fully adopted by this court—citing numerous authorities."

"Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."<sup>1</sup>

<sup>1</sup> Nash v. Towne, 5 Wall. 689.

## CHAPTER IV.

## STRANGERS.

SEC. 28. Inapplicability of general rule to strangers.

29. Rule as to best evidence.

**Sec. 28. Exclusion binds only parties and privies.**

The rule excluding extrinsic evidence in the construction of written instruments is applicable only to controversies between the parties to the instrument and their privies, and does not apply to controversies between third persons, or between one of the parties and a third person.

This doctrine is recognized by the leading elementary writers on evidence. Thus Greenleaf says (Ev. § 279), "The rule under consideration is applied only (in suits) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness or fraud of the parties, and who therefore ought not to be precluded from proving the truth, however contradictory to the written statements of others."

In *Lee v. Adsit*, 37 N. Y. 49, the court said: "The rule that parol extrinsic evidence shall not be received to contradict or vary a contract which is in writing, applies only in controversies between the parties, promisor and promisee, in such contract. It is founded upon the just and rational presumption, that the parties have made all the stipulations for the protection of their respective interests, on which they were agreed, and have, in language chosen by themselves, placed such stipulations in a more certain form than mere oral discourse, for the purpose of excluding all such loose and uncertain *media* of proof. The writing is not conclusive as between one of the contracting parties and a third person. This doctrine is asserted, in general terms, in a

multitude of authorities; but in many instances it is accompanied by remarks from which it might be contended that the privilege of explaining the written document was not accorded to him who was a party to it, but only to his adversary. 1 Greenl. Ev., sec. 279; *New Berlin v. Norwich*, 10 Johns. 230; *Evans v. Wells*, 22 Wend. 345. But it is not so confined. According to Co. Litt. 352a, 'every estoppel ought to be reciprocal—that is, to bind both parties; and this is the reason that regularly, a stranger shall neither take advantage of nor be bound by the estoppel.' To this effect see *Gaunt v. Wainman*, 3 Bing. N. C. 69; *Jewell v. Harrington*, 19 Wend., 472; *Sparrow v. Kingman*, 1 N. Y. 246, 253; *Cattle v. Snyder*, 10 Mo. 769.

"In *Reynolds v. Magness*, 1 Ired. 30, 31, after stating the general rule, and that it applies only as between the parties and not to strangers, Judge Gaston says: 'They (the strangers) are at liberty to show that the written instrument does not disclose the full or true character of the transaction. And if they be thus at liberty, when contending with a party to the transaction, *he* must be equally free, when contending with them. Both must be bound by this conventional law, or neither. \* \* \* Estoppels must be mutual.'

"In *Walton v. Cronly*, 14 Wend. 67, the right of a party to a deed to explain it, as against a third person, was maintained, though such third person was a privy in estate. Besides, although written contracts may not be varied by extrinsic parol evidence, in an ordinary action between the parties, yet when as sometimes happens, there is a mistake in the writing, a party affected thereby is not remediless. By an action in equity, he may have the writing reformed, and made to express the actual intent. In such an action, it is not necessary nor allowable, nor possible, to make all the world parties; those between whom the contract was made are alone heard. And of course if they happen to be both honest and intelligent, no suit for reformation can ever be requisite. This may suffice to illustrate the position now assumed.

"Neither are the terms of a written contract conclusive as to the shares or proportions in which a set of parties on one side of the contract are interested in its fruits, as between themselves. Such questions do not usually enter into the consideration of those who settle the forms of written contracts. Each party, in framing the contract, considers only what, by its terms, he may

exact from the other, and what the latter may thereby exact from him. The parties of the first part in a contract may have no joint or mutual interest in the subject-matter; one may be merely the agent, clerk or servant of the other; yet the paper would warrant, *prima facie*, the supposal of an equal interest. In an action on the contract, against the other party, no question of this sort can arise. But surely, in a controversy between the parties of the first part, the paper is not conclusive and irrefragable evidence of a mutual and equal interest in the benefits of the contract. If all the consignors had been expressly named as insured parties, the last-mentioned proposition would have full play, in a controversy between them, concerning the distribution of the insurance money. I have already shown that as between them, the question would be entirely open."

*Illustrations:* 1. In *Overseers of New Berlin v. Overseers of Norwich*, 10 Johns. 229 (1813), the question was the settlement of a pauper. The court says: "The purchase of an estate in a town will not gain a settlement for any longer time than the purchaser inhabits such estate, unless the consideration of the purchase amounts to \$75 *bona fide* paid. The overseers of the poor of the town of New Berlin offered to prove, that although the pauper had purchased a lot in that town for the consideration of \$250, and had mortgaged the lot back to secure the payment of \$200, yet in fact he had not paid any part of the consideration, and the evidence was rejected. The overseers of New Berlin were clearly entitled to show this fact, and were not estopped from showing it by the deed or mortgage, to which they were not parties. Such a conclusion would be unjust, by enabling a person at any time to procure a settlement by a purchase without payment, and so to defeat the provision in the act. It is a general rule that parties and privies are estopped from contradicting a written agreement by parol proof, but the rule does not extend to strangers, who have an interest in investigating and knowing the real truth of the case." The principle of our proposition is thus clearly recognized, although it seems that the evidence offered was competent even between the parties, as explanatory only of the consideration.

2. In *Stackpole v. Arnold*, 11 Mass. 27 (1814), referred to by Senator Verplanck in *Evans v. Wells*, *infra*, the declaration averred that the defendant made the several promissory notes declared on, by Cook & Foster in one instance, and by Zebedee

Cook in the others, as his agent; the notes were signed simply Cook & Foster, and Zebedee Cook; no hint of agency appeared in the notes; evidence that they were really given for the defendant having been admitted, and a recovery had against the defendant, a new trial was granted on the ground that such evidence was improper.

This is the leading case on the doctrine which it lays down, but there seems to be nothing in it inconsistent with the doctrine of our proposition. The extrinsic evidence was not introduced on the theory that the controversy was between third parties, or between one of the parties to the note and a stranger; but was introduced for the purpose of making liable, as a party to the note, one who did not appear on its face to be a party to it. The effect of the extrinsic evidence was to create a contract as against another party than the party apparently bound. The court in effect held that a promissory note cannot be constructed by parol, in the absence of any ambiguity which parol evidence would be competent, in the fulfillment of its true office, to explain.

3. This principle was recognized, although perhaps not necessarily involved, in *Whitbeck v. Whitbeck*, 9 Cowen 270; S. C. 18 Am. Dec. 503 (1828). "Parol evidence to show the true consideration of the deed or assignment from Peter to John Whitbeck, was properly received. The plaintiff was not a party, nor, in strictness, I apprehend, a privy to that conveyance; and the rule which prohibits the contradiction by parol of what is expressed in a deed, even if applicable to the consideration, I understand is confined to the parties or privies to the deed. The rule is founded on the principle that a party is estopped from impeaching or contradicting his deed. But the rule does not apply to the acknowledgment of consideration paid, in a deed, even as between the parties."

4. The rule was again recognized in *Krider v. Lafferty*, 1 Whart. 314 (1835), in which Kennedy, J., remarks: "It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness or fraud of the parties; and who therefore ought not to be precluded from proving the truth, however contradictory to the written instruments of others."

5. In *Johnson v. Blackman*, 11 Conn. 342 (1836), A., the payee of a note made jointly and severally by C. and D., assigned it to B., with this indorsement: "I assign the within note to



B.;" and received another note of the same amount from B., who was executor of C. In an action on the former note against D., it was claimed that this note was paid by the note of B.; and evidence that the indorsement was not made until after the note in question was thus paid, although, at the same interview, was held competent, on the principle laid down in our proposition, the court citing *Reading v. Weston*, and *Overseers of New Berlin v. Overseers of Norwich*.

6. In *Evans v. Wells*, 22 Wend. 345 (1839), in the court of errors, Senator Verplanck remarks: "The written instrument is held to merge all former conversations, negotiations, and explanations between the parties privy to it, but it should not, and does not, control the rights of either party against another person responsible on the same account, with whom no written agreement has been directly made. The writing is to such third person a negotiation *inter alios*, and can only be received as inferential evidence touching his liabilities, not as exclusive of all other testimony. The law will not permit parties to contradict, by external evidence, their *own* written contract. This is a sound principle of legal policy, but surely it does not follow from this, that the written contract between A. and B., which is conclusive as to them, must be of necessity so as to the proof of any rights or claims of A. against C., merely because they grow out of the same business. Numerous as are the authorities and decisions for the exclusion of parol evidence, offered in order to discharge the liability of persons bound by their own written agreement, I have found but one (11 Mass. 27), which extends the doctrine so as to make the written evidence of one man's liability on a contract, exclusive of all parol testimony of the liability of another on the same matter."

7. *Woodman v. Eastman*, 10 N. H. 359 (1839), was an action against the indorser of a promissory note, signed by John Averill, dated July 25, 1835, payable in one year. On the 25th of August, 1836, the plaintiff received from Averill, the maker, a note and draft, the note being taken in part payment, and agreed in writing that the draft, when paid—it having ninety days to run—should be in satisfaction of the first note, and that he would then deliver it up to Averill; "otherwise the said note to remain in full force." The defendant introduced, under objection, the testimony of Averill, as to the conversations which took place between Averill and the plaintiff at the time of the execution of the agreement,

to the effect that the plaintiff agreed not to attempt to enforce the note in suit until the draft fell due. In respect to this the court say, at page 365: "Nor is the evidence of Averill objectionable because it goes to prove an agreement which is not contained in the written receipt or agreement signed by the plaintiff, when he received the note and draft on the 25th of August. So far as it shows an agreement for delay, it does not contradict anything in that instrument, but is entirely consistent with it. But if it had contradicted it, the defendant, would not be precluded, by any writing between the plaintiff and Averill, from proving all the terms of the agreement. The rule that evidence cannot be admitted to contradict or add to the terms of a written instrument, has no application to third persons who are not parties to the written agreement."

8. *Reynolds v. Magness*, 2 Ired. 30 (1841), was an action against Benjamin Magness' executors to recover money paid as bail for Samuel Magness, against which Benjamin had indemnified the plaintiff. For the purpose of showing that the plaintiff had paid these moneys, he produced a bill of sale of certain negroes, and a deed of a tract of land executed to the surviving administrator of William Magness, which the parties said was to pay up an execution for which the present plaintiff was bound as bail for Samuel Magness, and the plaintiff said it was to enable him to recover the amount back from his principal, Samuel Magness. For the purpose of avoiding the effect of the statute of limitations, the plaintiff offered to prove that said deed and bill were only a mortgage. The defendant objected that the plaintiff was estopped. Judge Gaston remarked: "It is true, that if a controversy had arisen between the parties to these conveyances, and the bargainee had denied the parol agreement, the plaintiff would have found serious, perhaps insuperable, difficulty in establishing it. The rule of evidence, that where the parties to a contract have reduced their agreement to writing, parol evidence shall not be received to alter or contradict the written instrument, applies to controversies between the parties, and those claiming under them. The parties have constituted the written agreement to be the authentic memorial of their contract, and, because of this compact, the instrument must be taken, as between them, to speak the truth, and the whole truth, in relation to its subject-matter. But strangers have not assented to this compact, and therefore are not bound by it. Where their rights are concerned, they are at

liberty to show that the written instrument does not disclose the full or true character of the transaction. And if they be thus at liberty, when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this conventional law or neither."

9. *Fuller v. Acker*, 1 Hill, 473 (1841), was an action of replevin for wrongfully taking household furniture, claimed by the plaintiff under a mortgage from William Wagstaff. The mortgage was dated March 11, 1837, and was conditioned to pay by "the tenth of March, one thousand eight hundred and thirty." It had been renewed for three years. The defendant, who was sheriff, had seized the property under execution against Wagstaff. On the trial, Wagstaff was allowed to testify that in drawing the mortgage an error was committed, the time of payment being intended to be March 10, 1838, the word "eight" being omitted by mistake. On review, the court held the evidence properly admitted, Cowen, J., remarking, "on questions of fraud like this, which is *inter alios*, the objection of an estoppel does not apply, as it would if the litigation were between the immediate parties."

10. In *Taylor v. Baldwin*, 10 Barb. 587 (1850), it was held, that although, at a trial at law, the parties to a deed could not vary its terms by showing that it was intended as a mortgage, yet the rule was different as to strangers; and that a stranger "was not precluded from inquiring into the true character of the transaction, provided he has an interest in the subject-matter, which may be injuriously, if not fraudulently, affected if the truth can not be shown. \* \* \* To persons thus situated, the law has, in certain cases, allowed the right to show, by parol, the true character of a transaction in which the parties and their privies would have been estopped by their deed or other written instrument. The exception in favor of strangers, is to prevent a fraudulent operation of the instrument upon their rights. *Reading v. Weston*, 8 Conn. 121. This is the extent to which the authorities relied upon by the counsel go, and I have seen none which extends the principle beyond this."

11. In *Furbush v. Goodwin*, 25 N. H. 446 (1852), parol evidence was received to contradict an instrument claimed on one hand to be a contract, and on the other to be a mere receipt. The court held such evidence admissible in either event. They said: "But if it might be supposed that the receipt in question was in truth a contract between the parties to it, and as such, as

between them, could not admit of the explanation offered in this case, still as it is not a contract between the parties to this suit, upon that ground it was admissible. The rule excluding explanatory parol evidence applies only in a case where the contract to be explained is between the parties to the suit, and not where it is between other parties."

12. *Eaton v. Alger*, 2 Keyes, 41, 45 (1865), C. transferred to E. a note payable to bearer, drawn by J. P. A., and indorsed by W. S. A., and took E.'s receipt for it, agreeing "to account for the same on demand." In an action by E. against the maker and indorser, the receipt was introduced as evidence to establish the position that title to the note was not in the plaintiff, and that it was a contract of bailment, and testimony both of C. and E. offered to prove the nature of the contract and the consideration of the transfer was excluded. On appeal, this was held erroneous. The court say: "The general rule is, that estoppels are mutual. Parties to an instrument are mutually precluded from varying it by parol; but the rule does not apply to persons who are neither parties nor privies to the contract, and whose rights are not affected thereby. It cannot be doubted, that, if the rights of the defendants were injuriously affected by the receipt, they could contradict it by parol; and, therefore, the parties to the receipt are not estopped as to them, and in an action with them may show the real agreement by parol."

13. *Reading v. Weston*, 8 Conn. 117 (1830), at first sight seems to maintain a doctrine in conflict with our proposition; but on closer examination, it will be seen to be in harmony with it. The action was brought by the inhabitants of the town of Reading against the inhabitants of the town of Weston for the support of the wife and minor children of Samuel Darling. The paupers derived their settlement from Lucy Darling, the mother of Samuel Darling. The defendants claimed that in March, 1808, she became the owner of a piece of land in the town of Reading, of the value of \$800 by deed, absolute on its face, from Joseph Burr. Simultaneously with the delivery of the deed, she executed to Burr a writing, agreeing, if within three years he should pay her \$800 and interest, to surrender the deed; otherwise he forfeited all claim. Evidence of this agreement was offered, but rejected. Verdict for defendants. A new trial was denied. Chief Justice Hosmer says: "Undoubtedly there have been determinations, some of which have been cited, proving that a

stranger is not estopped by a written agreement, but that he may produce parol testimony to prevent a fraudulent operation of it upon his interests. *The King v. Scammonden*, 3 T. R. 474; *New Berlin v. Norwich*, 10 Johns. 229; 3 Stark. Ev. 1018, 1052. But this principle has no application to the present case. The plaintiffs have not suggested that there was any fraud contemplated and practiced on them. The pretense would have been very strange, unless it were followed up by explicit testimony to this effect. The inhabitancy of Lucy Darling, *prima facie*, with property sufficient to purchase a farm of the value of \$800, was a benefit to the plaintiffs, and not a prejudice; and all our towns would be pleased in this manner to extend their population." It will thus be seen that the principle of our proposition was not denied, but it was held not applicable to this particular case.

14. *Tyler v. Taylor*, 8 Barb. 585 (1850), on a cursory glance might also be deemed in conflict with the proposition; the syllabus conveys that idea; but in reality it is not. The dispute was between the assignee of one chattel mortgagee and the assignees of other mortgagees in the same mortgage, as to the ownership of some of the mortgaged property. The parties to the suit were thus not strangers, but privies to the original parties. Parol evidence offered by the plaintiff to show that the defendant's assignment was intended only as a release was properly excluded. Viewed in the light of these facts, there is nothing in the opinion of the court in conflict with our doctrine: "I apprehend that the principle of those cases cannot be applied to this, without also offering to show that the assignment was, by fraud, made to read differently from the actual agreement between the parties, to accomplish some covert purpose. It cannot be that when I have purchased a mortgage, and the assignment expresses the contract of purchase, it may be shown by parol that the assignment was intended merely to discharge the mortgage, without showing some other facts than the mere error in the assignment, and without any offer to show that the error was fraudulent. Such a doctrine would be alarming, and would leave the holders of such securities at the mercy of their debtors. In this case the offer was not made by the plaintiff claiming to be a *stranger*," etc. That is to say, the writing was binding on the plaintiff—because he was not a stranger—unless it could be shown to be fraudulent.

15. In *McMaster v. Ins. Co. of North America*, 55 N. Y. 222;

S. C. 14 Am. Rep. 239 (1873), it was held that in a contention between a party to an instrument and a stranger to it, either may give parol evidence differing from the contents of the instrument. The court recognized the rule that the instrument is only conclusive between the parties and their privies, that "strangers not having come into this agreement are not bound by it," and as the stranger may contradict it, "so the party to it is not to be at a disadvantage with his opponent, and he too in such a case may give the same kind of testimony."<sup>1</sup>

The rule as to the right of strangers to the contract, to vary it by parol, must be limited to rights independent of the instrument. As to rights which originate in the relation established by the instrument the ordinary rule must apply. Thus for example, in *Wodock v. Robinson*, Pennsylvania Supreme Court,<sup>2</sup> it was held that the wife of a tenant, who has engaged in the lease to keep the demised premises in repair, cannot in an action against the landlord for personal injuries occasioned by the falling of a floor, prove a parol agreement contemporaneous with the lease, for repairs by the lessor. The wife could have no right springing out of the occupancy except as founded on the lease, and her right must be bounded by the provisions of the lease, which in this respect being conclusive against the husband were conclusive against her.

## Sec. 29. Writing still best evidence.

But even in respect to strangers to the instrument, the writing itself is the best evidence, and must if possible

<sup>1</sup> To the same effect :

*Pope v. O'Hara*, 48 N. Y. 446.

*Coleman v. Pike County*, 83 Ala. 326 ;

S. C. 3 Am. St. Rep. 746.

*Lowell Manf. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591.

*Brown v. Thurber*, 77 N. Y. 613.

*Spooner v. Cummings*, 151 Mass. 313.

*Condit v. Cowdrey*, 123 N. Y. 463.

*Dempsey v. Kipp*, 61 N. Y. 465.

*Bruce v. Roper Lumber Co.*, 87 Va. 381 ; S. C. 24 Am. St. Rep. 657.

*Manf. Co. v. Wire Fence*, 109 Ill. 71.

*Tyson v. Post*, 108 N. Y. 217 ; S. C. 2 Am. St. Rep. 409.

*Burns v. Thompson*, 91 Ind. 146.

*Hussman v. Wilke*, 50 Cal. 250.

*Herryford v. Davis*, 102 U. S. 235.

*Nat. Car, etc., Builder v. Cyclone, etc., Co.*, — Minn. — ; 51 N. W. Rep. 657.

*Grove v. Rentch*, 26 Md. 378. In the latter case it was held that a stranger may contradict the writing. But in *Henderson v. Mayhew*, 2 Gill, 393 ; S. C. 41 Am. Dec. 434, it was held that a party may not show as against a stranger that a bill of sale is a mortgage.

*Buxton v. Beal*, — Minn. — ; 51 N. W. Rep. 918.

*Surles v. State*, — Ga. — ; 15 S. E. Rep. 38.

<sup>2</sup> 24 Atl. Rep. 73.

be produced, and if producible, parol evidence of its contents is not admissible.

*Illustrations:* Thus in *Clow v. Brown*, — Ind. —, the court said: “The question of fact chiefly controverted on the trial of the cause related to the payment of the capital stock of the company, the contention of the plaintiffs being that no part of the capital stock had been paid into the treasury. The plaintiffs, to establish this proposition, placed the secretary of the company upon the stand, who testified that he held \$7,000 of the stock, par value, which he obtained from Messrs. *Comegys & Lewis*, being a part of the \$197,000 of the stock issued to them by the company. The witness was then asked this question: ‘What was that stock issued to *Comegys & Lewis* for?’ The defendants objected to the witness answering this question, on the ground that the consideration paid by *Comegys & Lewis* for the stock was evidenced by a written contract, which contract was exhibited to and identified by the witness. The court sustained the objection, and exceptions were noted. We are of the opinion that the court did not err in this ruling. If the stock was issued to *Comegys & Lewis* in pursuance of a written contract executed between them and the company, this writing was certainly the best evidence. No citation of authorities or argument is necessary to establish the truth of this proposition as a general rule of evidence. The arrangement by which this stock was issued to *Comegys & Lewis* was not a merely collateral matter, incidentally involved, but was an essential element in the plaintiffs’ case. If the stock was in fact turned over to *Comegys & Lewis* in pursuance of the contract, the parol evidence proposed to be elicited by the witness upon the stand must necessarily have consisted of his recollection of the terms and conditions of that contract, and be subject to all the imperfections of the memory and liability to mistakes in reciting the terms of a written contract. The fact that the plaintiffs were not parties to the contract does not alter the rule of law that the writing was the best evidence of its own contents, terms, and conditions. The admissibility of the written contract as the best evidence, as a rule of evidence, is one thing, and the force to be given to that evidence when admitted is quite another. What we decide is that the written contract was the best evidence of the purpose and circumstances under which the stock was issued, and not that the plaintiffs were concluded by a contract to which they were not parties. The case of *Burns v. Thompson*,

91 Ind. 146, is not in conflict with this ruling. All that was held in that case was that while a dispositive instrument could not, as between parties to it, be waived by parol, one not a party to it might impeach it, as being a means adopted by the opposite party to defraud him."



## CHAPTER V.

## CONSIDERATION.

- SEC. 29. Failure of — unsealed instruments.  
 30. Sealed instruments.  
 31. Real consideration.

**Sec. 29. Failure of consideration—unsealed instruments.**

Parol evidence is admissible to show a failure or original lack of consideration of an unsealed contract, as between the parties.<sup>1</sup>

*Reasons of the rule:* If the inducement to the making of the contract has failed, and thus the reason of its being has ceased to exist, the law will not hold the other party to a performance without benefit and to his loss and damage, but will allow him to show the subsequent change of circumstances. If there was originally no consideration there was no contract, and that there was no contract may always be shown. The evidence is also admitted on the ground that the recital of consideration is a mere receipt, and thus open to parol contradiction.

*Exceptions:* But a purchaser of mortgaged chattels may not show that the mortgagee had not fulfilled his contract, which was the consideration of the mortgage.<sup>2</sup> So sureties on a lease may not show a breach of a collateral agreement of the landlord with the tenant.<sup>3</sup>

<sup>1</sup> Stackpole v. Arnold, 11 Mass. 27; S. C. 6 Am. Dec. 150.

Amherst Academy v. Cows, 6 Pick. 427.

Folsom v. Mussey, 8 Greenl. 400.

Gt. West. Ins. Co. v. Rees, 29 Ill. 272.

Erwin v. Saunders, 1 Cow. 249.

1 Greenl. Ev. § 284.

Meyer v. Casey, 57 Miss. 615.

Dean v. Mason, 4 Conn. 428.

Waymack v. Heilman, 26 Ark. 449.

Anthony v. Harrison, 14 Hun, 198; S. C. 74 N. Y. 613.

Eaton v. Eaton, 35 N. J. L. 290.

<sup>2</sup> Moore v. Prentiss Tool Co., N. Y. Super. 39 St. Rep. 361.

<sup>3</sup> Lasher v. Williamson, 55 N. Y. 619.

### Sec. 30. Sealed instruments.

At ancient common law a seal conclusively imported a consideration, but this rule is relaxed by modern legislation, in some States.

*Illustrations:* Thus a mortgage on lands may be shown to have been without consideration, under a statute making the recital only presumptive evidence of consideration.<sup>1</sup>

*Rule in cases of voluntary specialty:* In *Aller v. Aller*, 40 N. J. L. 446, it was held that although the statute makes a seal only presumptive evidence of consideration, yet an obligor cannot avoid his bond on the ground that it was voluntary, because "the parties intended and understood that there should be no consideration," and upon the theory that the statute was only intended to defeat fraud and illegality. The statute introduces a new rule of evidence, said the court, but does not take from the seal its effect of establishing a contract according to the intention of the parties.

### Sec. 31. Real consideration.

Parol evidence is admissible to show the real consideration and purpose, although it contradicts the recital; and to contradict the acknowledgment of payment; but not to cut down the consideration, except in an action to correct a mistake; nor to defeat the instrument.<sup>2</sup>

"The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing or receiving the instrument."<sup>3</sup>

<sup>1</sup> *Parkhurst v. Higgins*, 38 Hun, 113.

*Anthony v. Harrison*, 74 N. Y. 613.

*Aller v. Aller*, 40 N. J. L. 446.

*Comstock v. Breed*, 12 Cal. 288.

*Steinhauer v. Witman*, 1 S. & R. 438.

<sup>2</sup> *M'Crea v. Purmort*, 16 Wend. 460; S.

C. 30 Am. Dec. 103.

*Goodspeed v. Fuller*, 46 Me. 141; S. C.

71 Am. Dec. 572.

*Rhine v. Ellen*, 36 Cal. 362.

*Bolles v. Sachs*, 37 Minn. 315.

*Raub v. Barbour*, 6 Mackey, 245.

*Halpin v. Stone*, 78 Wis. 183.

*Hame v. Van Orden*, 84 N. Y. 269.

*Holmes' Appeal*, 79 Pa. St. 279.

*Mason v. Buchanan*, 62 Ala. 110.

*Hayes v. Peck*, 107 Ind. 389.

*Barter v. Greenleaf*, 65 Me. 405.

*Hutchins v. Hebbard*, 34 N. Y. 24.

*Ruggles v. Glare*, Ks. 26 Pac. Repr. 25.

<sup>3</sup> *Peugh v. Davis*, 96 U. S. 336.

The line between this inquiry and that concerning incomplete and collateral agreements are to some extent coterminous, and reference should here be made to chapter 12, in which the latter topic is discussed.

"The right to vary or explain the consideration expressed in a written contract, or to prove that it was never paid, does not authorize the introduction of such testimony to affect the terms or validity of the contract."<sup>1</sup>

"It is well settled in the law of this State, that an instrument assigning or conveying real or personal property in absolute terms, may by parol evidence be shown to have been intended as security only. While this rule is an exception to the general rule of evidence, forbidding the contradiction or explanation of written instruments by parol evidence, it has long been established in the law of this State. It grew up in the equity courts from the efforts of equity judges to prevent forfeitures, to relieve against frauds, and to enforce the equitable maxim, 'once a mortgage always a mortgage.'

"It was supposed that the evidence did not contradict the instrument, but simply showed the purpose for which it was given, and that the instrument, although purposely made absolute, was so made, however, simply for the purpose of giving security to the party to whom it was given, which was not really inconsistent with its form. Hence it was conceived that parol evidence showing the purpose was not an invasion of the general rule forbidding such evidence to vary, explain or contradict a written instrument. The rule having been established in chancery, was finally, after the Code, and the union of law and equity jurisdiction in the same court, made applicable to cases both in law and in equity. So if this were simply an absolute assignment of the policy to Gibson, there could be no question, under the law of this State, that the plaintiff could be permitted to show by parol that it was intended as collateral security."<sup>2</sup>

*Illustrations:* In *Harrington v. Samples*, 36 Minn. 200, the question was, whether in an action by the mortgagor of chattels to recover the property from the mortgagee, who had taken it under the mortgage, the mortgagor might show by parol evidence the facts that although the mortgage in terms secured contemporary promissory notes of mortgagor therein described, yet the mortgage and notes were really given for the purpose of securing

<sup>1</sup> *Schneider v. Turner*, 130 Ill. 28.

<sup>2</sup> *Marsh v. McNair*, 99 N. Y. 178.

a pre-existing debt of the mortgagor to the mortgagee, and also to indemnify the mortgagee on account of the making of certain notes for the accommodation of the mortgagor; and that the obligations of the mortgagor, for which the mortgage was intended as security, have been fully performed. In holding that the evidence was admissible, the court said: "The rule against contradicting or varying the terms of a written instrument by parol evidence did not exclude the evidence offered for the purpose of showing the real consideration for which the mortgage security was given, and that it had been *discharged* by the performance of the obligation to secure which it had been executed.

"In *Schurmeier v. Johnson*, 10 Minn. 319 (Gil. 250), the purpose of the parol evidence was not to show that the written obligation was intended as collateral security, and that it had been satisfied by the performance of the principal obligation, but it was sought to avoid the written agreement by parol evidence of a contemporaneous agreement unperformed, that a different contract should be substituted for that embodied in the written instrument upon which a recovery was claimed."

2. In *Barker v. Bradley*, 42 N. Y. 316; S. C. 1 Am. Rep. 521, receipts were expressed to be of "one dollar in full of all demands." It was held that evidence was competent to show that there was a contemporaneous oral promise to pay \$2,000. The court said: "In reference to all instruments acknowledging the receipt of a consideration, in the form contained in these instruments, it is now well settled that it is competent by parol to show that no consideration was in fact paid or received, or that the consideration was greater or less than, or different from, the one expressed. This may be done for every purpose except to impeach or destroy the instrument. The amount or kind of consideration is not considered an essential part of the contract, and is open to contradiction or explanation, like a common receipt."

*Transfer of personalty as security:* So a written transfer of personal property, absolute on its face, may be shown by parol to be merely for security. "A court of equity looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the

transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. The rule does not forbid an inquiring into the object of the parties in executing or receiving the instrument."

1. Where a chattel mortgage recites an indebtedness of \$6,000 as its consideration, it may be shown that the real consideration was the indorsement by the mortgagee of the mortgagor's note. Thus in *McKinster v. Babcock*, 26 N. Y. 378, where this was held, it was said: "Parol evidence may be given to contradict or explain a mere receipt, and this rule was long since applied to the acknowledgment of the receipt of the consideration expressed in a deed. *Shephard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 id. 338; 11 Am. Dec. 286. In *M'Crea v. Purmort*, 16 Wend. 460, the English and American cases are largely considered, and it was held that it might be shown that the consideration was iron, of a specified quantity, valued at a stipulated price, instead of money paid, as expressed in the deed. And it was said in the opinion that the cases decided surrendered the consideration clause in a deed to the utmost latitude of inquiry, whenever this should become material to a personal action between the parties. It has been adjudged in several cases that parol evidence is admissible to show the purpose and intent for which a mortgage was executed, though upon its face it should appear to be for the payment of a specified sum of money. It may be shown that its purpose was security for future advances, or responsibilities, or for balances which might be due from time to time. In *Shirras v. Caig*, 7 Cranch, 34, the mortgage purported to secure a debt of £30,000, due to all the mortgagees. It was shown, by parol evidence, that the intent and purpose of the mortgage was to secure different sums due at the time to different mortgagees, and advances afterward to be made, and liabilities to be incurred to an uncertain amount. See also *Bank of Utica v. Finch*, 3 Barb. Ch. 293; 49 Am. Dec. 175. In *Truscott v. King*, 6 N. Y. 147, a judgment was confessed for \$20,000. It was shown by parol evidence that the purpose of the judgment was a security for future advances. These cases relate to the purposes and objects of the mortgages or judgment which bound real estate, and parol

<sup>1</sup> *Brick v. Brick*, 98 U. S. 514, citing  
*Hughes v. Edwards*, 9 Wheat, 489.

*Russell v. Southard*, 12 How. 139.

evidence was admitted for the purpose of showing the true consideration under the rule that the consideration is open to inquiry. The Supreme Court of the United States have applied the same rule to a chattel mortgage made in Illinois. *Lawrence v. Tucker*, 23 How. 14." An absolute assignment of a bond and mortgage may be shown to have been merely as collateral security.<sup>1</sup> So of a bill of sale.<sup>2</sup> An absolute bill of sale may be shown to have been intended to be in trust for creditors.<sup>3</sup> So of an absolute assignment of a life insurance policy.<sup>4</sup> So of an assignment of a judgment.<sup>5</sup> So of an assignment of a lease.<sup>6</sup>

2. In *Chester v. Bank of Kingston*, 16 N. Y. 336, the court said: "Where, as in this case in respect to the bond, there is a perfect delivery of a written obligation, it is plain that evidence cannot be given of a contemporaneous parol agreement, contradicting the terms of the instrument or impairing its force. But this rule does not exclude evidence to show that the obligation is collateral to some debt of the obligor or of a third person, and is to become extinct when the debt is paid. Thus A. may be a creditor of B., and may take the common bond of C. for the same debt. The bond is discharged when the debt of B is paid, and it may be shown by parol that such was the agreement and such the purpose of obligation. Such evidence is not regarded as contradicting the written undertaking, but as tending to show that it had been paid and discharged by another person bound for the same debt."

3. In *Boyce v. Wilson*, 32 Md. 122, it was held that parol evidence was not admissible to vary the written contract by striking therefrom the consideration expressed in it, and inserting in its stead another reduced consideration, except in a direct suit in equity to correct the mistake, and in *Stockham v. Stockham*, 32 Md. 196, a written offer of \$11,000 for a farm having been made and accepted, parol proof that it was worth \$15,000 or \$16,000 at the date of the contract was held inadmissible.

<sup>1</sup> *Pond v. Eddy*, 113 Mass. 149.

*Fullwood v. Blanding*, 26 S. C. 312.

*Mulford v. Muller*, 1 Keyes, 31.

<sup>2</sup> *Bryant v. Crosby*, 36 Me. 562; S. C. 58 Am. Dec. 767.

*Clark v. Wash. Fire Ins. Co.* 100 Mass. 509; S. C. 1 Am. Rep. 135.

*Johnson's Ex. v. Clark*, 5 Ark. 321.

*Smith v. Beattie*, 31 N. Y. 542.

*Booth v. Robinson*, 55 Md. 419.

*Morgan's Assignees v. Shinn*, 15 Wall. 105.

*Yarbrough v. Newell*, 10 Yerg. 376; (*contra*: *Thompson v. Patton*, 5 Litt. 74; S. C. 15 Am. Dec. 44.)

<sup>3</sup> *Britton v. Lorenz*, 45 N. Y. 51.

<sup>4</sup> *Matthews v. Sheehan*, 69 N. Y. 585.

<sup>5</sup> *Wade v. Carter*, 76 N. C. 171.

<sup>6</sup> *Despard v. Walbridge*, 15 N. Y. 374.

4. In *Lamson v. Moffat*, 61 Wis. 153, it was held that a written contract, by the terms of which M. leases a farm to L. for one year, surrenders possession at once, and agrees to do all the work in raising a crop thereon, and to deliver the whole of such crop to L., the latter agreeing to furnish all the groceries needed by M., to furnish the seed, to sign a promissory note of even date with the contract for the sole benefit of M., and upon delivery of the crop to give M. a receipt for \$300 of present indebtedness of M. to L., is upon its face a lease, but may be shown by parol or other competent evidence to have been intended merely as a mortgage of the crop. The court said: "It presents the well-settled proposition that a bill of sale of chattels, or an absolute deed or lease of real estate, may be shown to have been given as a mortgage security by parol, or other competent evidence; and where the evidence satisfactorily shows that fact, then the conveyance, whatever its nature or form, will be treated as a mortgage; and the rights of the parties under such contract will be such, and only such, as they would have been had the writing on its face created the relation of mortgagor and mortgagee."

5. Although parol evidence is incompetent to vary the consideration of a bond,<sup>1</sup> yet the real character of the funds in which it is payable may be shown. Thus the consideration of a bond may be shown by parol to have been intended not to be payable in Confederate money, where the language was "funds current in the State of Virginia."<sup>2</sup>

6. Parol evidence is admissible to show that two bonds were given for the same debt.<sup>3</sup> That the debt secured by a chattel mortgage is still to be contracted, although this contradicts the recital,<sup>4</sup> and to show the amount due on a chattel mortgage executed to secure future obligations or balances.<sup>5</sup>

7. Where a bond states no consideration, but shows by implication that it is collateral to some agreement not specified, it may be shown by parol that the consideration was a contract of agency.<sup>6</sup>

8. On a sale of a store and goods therein, it may be shown by parol that the good-will of the business formed part of the consideration.<sup>7</sup> A deed of a patent may be shown to be a mere security.<sup>8</sup>

<sup>1</sup> *Cocks v. Barker*, 49 N. Y. 107.

<sup>2</sup> *Wrightsmen v. Bowyer*, 24 Gratt. 433.

<sup>3</sup> *Delaplaine v. Hitchcock*, 6 Hill, 14.

<sup>4</sup> *McKinster v. Babcock*, 26 N. Y. 380.

<sup>5</sup> *Robinson v. Williams*, 22 N. Y. 380.

<sup>6</sup> *Singer Manuf. Co. v. Forsyth*, 108 Ind. 334.

<sup>7</sup> *Fusting v. Sullivan*, 41 Md. 162.

<sup>8</sup> *Barry v. Colville*, 129 N. Y. 302.

9. In *Graver v. Scott*, 80 Pa. St. 88, the contract was for the sale of a piece of land, "also a tract of coal property." It was held competent to show by parol that the parties intended it as an entire contract, that the piece of land was necessary to the enjoyment of the coal property, and that it was an inducement to the execution of the contract. But in *Buchtel v. Mason Lumber Co.* 9 Chic. Leg. News, 225, in the federal circuit of the western district of Michigan, an action on a guaranty of a contract for the sale of lands, evidence to show a parol warranty of a certain quantity of timber on the lands, as the chief inducement to the execution of the guaranty, was refused.

10. *Mortgage as indemnity*: In *Kimball v. Myers*, 21 Mich. 276; S. C. 4 Am. Rep. 487, where a mortgage of land was given for a specified sum, it was held competent to prove by parol that it was to indemnify the mortgagee as security for the mortgagor on a note. Cooley, J., said: "It is insisted that it is not competent to prove by parol that it was given to indemnify defendant for becoming security for Morton on the note to Waldby, as this would show, that instead of being given for what appears on its face, it was for a totally different purpose; and thus the contract would be changed by parol from that stated in the writing to one entirely different. Several cases are cited in support of this position. *Stevens v. Cooper*, 1 Johns. Ch. 425, was a case in which it was attempted to attach to a mortgage of several lots a parol contemporaneous agreement, that in case the mortgagor sold either of the lots, the mortgagee would release it from the mortgage on being paid a certain proportionate sum of the amount secured. This was so plainly incompetent that no question would now be made regarding the correctness of the ruling which excluded the evidence of such an agreement. *Barker v. Buel*, 5 Cush. 519, was where it was sought to show that a mortgage given to secure a surety against the whole amount of a debt was designed to secure him against one-third only. The same may be said of this case as of the last, and with equal reason. *Foy v. Blackstone*, 31 Ill. 538, holds that it is not competent for the maker of an absolute note to show, as against the payee or an indorsee, that by an oral contemporaneous agreement, it was only to be payable on a contingency. *Columbia v. Amos*, 5 Ind. 184, was in legal effect precisely like the case in Illinois. *Adair v. Adair*, 5 Mich. 204, seems to be the case most relied upon by the defense. That was a bill to foreclose a mortgage for a certain



sum of money, payable in definite installments at fixed periods. The defendant offered to show that when the mortgage was given nothing was due to the mortgagee, and that the mortgage was made, not to secure the payment of any sum of money, but as security for the performance by defendant of a parol contract by which he agreed to pay certain debts of the mortgagee, and to work for and assist him in supporting himself and his wife, they being the defendant's parents. The court held such evidence incompetent, as it entirely changed the character and legal effect of the instrument. Now we are unable to see that any of these cases has a bearing upon the case at bar. We do not understand that the case made by complainant's bill and supported by his proof imports into the mortgage any parol agreement which alters its terms or legal effect. The mortgage was for \$800, payable in one year. The complainant does not dispute that the defendant had a right to enforce the mortgage in exact accordance with its terms, unless it was paid and satisfied. His case is, that the mortgage was satisfied by the payment of the Waldby debt; and the parol evidence he offers is not to contradict or vary the mortgage, but to identify the demand to which it referred. This we understood to be always competent. We understand, also, that evidence of the satisfaction of a demand actually received, though in a manner varying from that agreed, is always competent, notwithstanding it may have been received in accordance with some contemporaneous agreement. *Bradley v. Bentley*, 8 Vt. 245, per Collamer, J.; *Hagood v. Swords*, 2 Bailey, 305; *Crosman v. Fuller*, 17 Pick. 174." The same doctrine is recognized in *Truscott v. King*, 6 N. Y. 161; *Price v. Gover*, 40 Md. 102; and in *Moses v. Hatfield*, 27 S. C. 324, oral evidence was permitted to show that an absolute mortgage on land was given for future advances; and in *Simons v. First National Bank*, 93 N. Y. 269, to show that a mortgage conditioned as security for "any indebtedness" contemplated future indebtedness.

11. Evidence is competent to identify a note secured by a mortgage.<sup>1</sup>

<sup>1</sup> *Fitzpatrick v. School Comrs.* 7 Humph. 224; S. C. 46 Am. Dec. 76.

*Johns v. Church*, 12 Pick. 557; S. C. 23 Am. Dec. 651.

*Williams v. Hilton*, 35 Me. 547; S. C. 58 Am. Dec. 729.

*Fort Worth Nat. Bk. v. Red River Nat. Bank*, — Tex. —.

## CHAPTER VI.

## FORMATION AND DELIVERY.

SEC. 32. Conditional delivery.

33. Lack of legal existence.

**Sec. 32. Conditional delivery.**

Parol evidence is competent to show that a writing, in form a complete contract, and delivered, was not to become binding until the performance of some condition resting in parol.<sup>1</sup>

*Illustrations:* 1. As in *Wilson v. Powers*, 131 Mass. 539, to show that an agreement by a creditor to extend the time of payment by a debtor was only to become binding upon the assent of the surety. The court said: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative and that its obligation never commenced. *Whitaker v. Salisbury*, 15 Pick. 534; *Davis v. Jones*, 17 C. B. 625. Whether the delivery of a paper is absolute or conditional is a question of fact. That a delivery should be conditional, it is not necessary that express words to that effect should be used at the time. That conclusion may be drawn from all the circumstances which properly form a part of the entire transaction, whether in point of time they precede or

<sup>1</sup> *Reynolds v. Robinson*, 110 N. Y. 654.

*Benton v. Martin*, 52 N. Y. 570.

*Juilliard v. Chaffee*, 92 N. Y. 535.

*Pym v. Campbell*, 6 Ell. & Bl. 370.

*Wallis v. Littell*, 11 C. B. 368.

*Wilson v. Powers*, 131 Mass. 539.

*Eastman v. Shaw*, 65 N. Y. 522.

*Skaarass v. Finnegan*, 31 Minn. 48.

*Westman v. Krumweide*, 30 Minn. 313.

*Ottawa, etc., R. Co. v. Hall*, 1 Bradw.

612.

*Brown v. East. Slate Co.*, 134 Mass. 590.

*Branson v. Oregonian Ry. Co.*, 11 Oreg. 161.

*Beall v. Poole*, 27 Md. 645.

*Sharp v. U. S.*, 4 Watts, 21.

*Sweet v. Stevens*, 7 R. I. 375.

*Monro v. Taylor*, 8 Hare, 56.

*Davis v. Jones*, 17 C. B. 625.

*Rogers v. Hadley*, 2 H. & C. 229.

*Foster v. Mackinnon*, L. R., 4 C. P. 704.

*Clever v. Kirkman*, 33 L. T. Rep. (N. S.) 672.

accompany the delivery. *Murray v. Earl of Stair*, 2 B. & C. 82." And in *Juilliard v. Chaffee*, 92 N. Y. 535, to show that an acknowledgment of a loan of money was to become an indebtedness only if the receiver failed to apply it on debts of the apparent lender which were to mature. And in *Eastman v. Shaw*, 65 N. Y. 522, to show that a note was only to become binding on the formation of a corporation. And in *Pym v. Campbell*, 6 Ell. & Bl. 370, to show that a sale of a patent was only to take effect on the approval of a certain third person. And in *Faunce v. State M. L. Ass. Co.*, 101 Mass. 279, to show that a policy of insurance was to issue only on the surrender of a prior policy, which was never surrendered.

2. So an oral agreement may be shown that an executed bond was to remain in the subscribing witness' hands until the death of A. B. and the surrender of certain securities.<sup>1</sup> And that articles of partnership were not to become operative until the party drawing them up should be satisfied that the indebtedness of two of the parties did not exceed a certain sum.<sup>2</sup>

3. In *Leppoc v. Nat. Union Bank*, 32 Md. 136, a committee of the Union Bank agreed with D. to purchase from him a certain tract of land, provided the board of directors of the bank would assent to it, and the counsel of the bank would approve it. Thereupon D. had the deed prepared, procured a revenue stamp from the cashier of the bank, and notified him that he intended to have it recorded. It was then duly acknowledged and recorded. L., a judgment creditor of D., then laid an attachment in the hands of the bank. The purchase was afterward disapproved by the bank's counsel, D. notified of the disapproval, and the property re-conveyed by deed to D. It was *held*, 1, that evidence was admissible to show the arrangement and understanding on which the deed was to have been made; the rule which excludes parol evidence to affect that which is written not being infringed by the admission of such evidence to show that the instrument was *void*, or that it never had any legal existence or binding force, for want of due delivery and acceptance; 2, that the acceptance of the deed by the bank being dependent on events which never occurred, there was no such delivery of the deed as to make the bank responsible under the attachment process; nor can the making of the deed and placing it on record by the grantor, without sufficient legal sanction of the bank, charge the bank as

<sup>1</sup> *Murray v. Earl of Stair*, 2 B. & C. 82.

<sup>2</sup> *Beall v. Poole*, 27 Md. 645.

grantee; 3, that while a deed, duly acknowledged and recorded, will be treated as having been delivered to and accepted by the grantee, in the absence of all proof to the contrary, these facts only give rise to a *prima facie* presumption, liable to be repelled.

4. So where an agreement recited that it was executed by several persons, oral evidence may be given to show that it was executed and delivered by one on condition that the other join.<sup>1</sup> "It is very well settled," said the court, "that where a bond, a deed, or other written instrument is executed by a portion only of those who appear in the body of the instrument as parties, the question whether those who have executed it are bound, depends upon the circumstances under which the instrument was delivered. Those circumstances are open to proof by parol, and if it appears that at the time of the delivery, by any party whose signature is affixed, anything was said indicating that such party did not intend to be bound unless other parties also signed, the delivery will be considered as not absolute, but in escrow merely."

*Inconsistency between condition and written terms:* Where there is a conditional delivery of the contract, it makes no difference that the condition is inconsistent with and contradictory of the terms of the contract.

This is well illustrated in *Reynolds v. Robinson*, 37 Hun, 561, 110 N. Y. 654. This was a case of a contract of sale entered into by letters, which provided for a specific term of credit. Evidence was given that it was orally agreed that there was to be no sale unless the vendor obtained a favorable report of the purchaser's financial standing from a mercantile agency to which he was referred. In the Supreme Court this was held improperly received, on the ground that it "tended directly to impair the force of a provision introduced into the written contract," and was in no sense a collateral agreement. But the court seem to have mistaken the ground on which the admission was based. It was not claimed that the oral agreement was collateral and additional, but that the evidence went to show that there was no contract. The writings and the oral agreement amounted to a sale on credit if the report was favorable, but if unfavorable then there was to be no sale; if the party proved worthy of credit, there was to be a sale on the credit specified in the letters; if unworthy, then there was to be no sale at all. The decision of the supreme court was criti-

<sup>1</sup> *Chouteau v. Suydam*, 21 N. Y. 179. (See 25 Am. Rep. 706.)

cised by Mr. Jones (Const. Cont. § 161, note), on the ground that it was a case of conditional delivery, and subsequently the decision was reversed by the Court of Appeals (110 N. Y. 654), the court observing: "The finding of the referee, which is supported by evidence, to the effect that the contract for the purchase and sale of the lumber on credit, contained in the correspondence between the parties, proceeded upon a contemporaneous oral understanding that the obligation of the defendants to sell and deliver was contingent upon their obtaining satisfactory reports from the commercial agencies as to the pecuniary responsibility of the plaintiff, brings the case within an exception to the general rule that a written contract cannot be varied by parol evidence, or rather it brings the case within the rule, now quite well established, that parol evidence is admissible to show that a written paper which, in form, is a complete contract, of which there has been a manual tradition, was nevertheless not to become a binding contract until the performance of some condition precedent resting in parol."

### Sec. 33. Lack of legal existence.

Parol evidence is admissible to show that an apparent contract never had a legal existence.

*Illustrations:* 1. A familiar example is an insurance policy, in a suit upon which evidence of want of interest, or the converse, on the part of the insured, is competent.<sup>1</sup>

2. It has been held that where no goods are furnished for transportation, no basis is furnished for a bill of sale reciting the receipt of goods, and parol evidence is competent to show the fact, even as against a *bona fide* consignee or indorsee.<sup>2</sup>

3. On this principle, parol evidence is admitted to show that a shipper did not assent to stipulations in a receipt or bill of lading.<sup>3</sup> And that a carrier's receipt did not bind him.<sup>4</sup>

4. Parties to a contract may agree upon the method of its execution and delivery, and if any material stipulation relating

<sup>1</sup> Cross v. Nat. F. Ins. Co. 132 N. Y. 133.  
See also Brewster v. Reel, 74 Iowa, 506, the case of one partner's conveying the partnership property to pay his copartner's individual debt, without his consent; Corbin v. Sistrunk, 19 Ala. (N. S.) 203; Hoag v. Owen, 60 Barb. 34; Black v. W., etc., Ry. Co. 111 Ill. 351.

<sup>2</sup> Black v. Wilmington, etc., R. Co. 92 N. C. 42; S. C. 53 Am. Rep. 450.  
Pollard v. Vinton, 105 U. S. 7.

<sup>3</sup> King v. Woodbridge, 34 Vt. 565.  
Boorman v. Am. Ex. Co. 21 Wis. 152.  
Madan v. Sherard, 73 N. Y. 329; S. C. 29 Am. Rep. 153.

<sup>4</sup> Scovill v. Griffith, 12 N. Y. 509.

thereto remains unperformed by them, the instrument will not take effect as their contract. In *Whitford v. Laidler*, 94 N. Y. 145; S. C. 46 Am. Rep. 131, an instrument purporting to be a contract between the plaintiff of one part, and thirteen individuals therein named of the other part, was signed by the plaintiff and by some but not all of the thirteen, and by the mutual consent of all signing was left with another person, not a party to it, to procure the signatures of the other parties named therein, and upon his accomplishing that object he was instructed to deliver the paper to the town clerk. *Held*, that until that condition was performed, the writing was incomplete and unexecuted. The court said: "The proper execution of a written instrument, according to the understanding of the parties, and its delivery in a particular manner, where such delivery is provided for, are essential perquisites to the legal execution of the instrument."

5. In *Union Trust Co. v. Whiton*, 97 N. Y. 172, an action to recover the amount of an alleged loan from plaintiff to defendant, the defense was that the loan was negotiated by defendant for and upon collaterals belonging to a disclosed principal. Plaintiff proved the delivery of a check to defendant, payable to his order, for the amount of the loan, and produced an envelope in which were the securities upon which the loan was made; upon this was indorsed the date of the transaction, defendant's name and place of business, written by him, the time of the loan, from whom, the amount of the rate of interest, and then a list of the securities. *Held*, that the indorsement was not a contract, as there was no promise to pay, nor was it an acknowledgment of an indebtedness, or that defendant was the borrower, and that parol evidence was proper to show that fact. The court said: "Where the language of an instrument is ambiguous, evidence of the surrounding circumstances may be resorted to for the purpose of determining what the real intention is. *Brill v. Tuttle*, 81 N. Y. 454. Parol evidence may also be introduced to show that even when a writing purports to be a contract it may not be such. *Grierson v. Mason*, 60 N. Y. 397. In the case last cited the defendant had proved a contract and the plaintiff proved an instrument which altered the contract. The defendant introduced evidence to show that the instrument was not intended as an alteration of the contract, but was executed with the view of accomplishing a particular purpose. It was then laid down that such evidence was not given to change the written contract by parol, but to establish

that such contract had no force, efficacy or effect. That it was not intended to be a contract, and that such evidence did not come within the ordinary rule of excluding parol evidence to contradict written testimony, but tends to explain the circumstances under which such an instrument was executed and delivered. It is also stated that the purpose for which a writing was executed may be proved by parol when not inconsistent with its terms. If the rules stated are applicable where there is a complete contract, much stronger reasons exist for invoking them where the terms of the contract are uncertain and ambiguous, as is the fact in the case at bar. The rule appears to be well established, that even although a contract is made out, if any ambiguity arises in reference to any portion of it, the question presented is one of fact for the consideration of the jury, upon such testimony, either in writing or oral, as the parties are able to present. See *Brill v. Tuttle*, 81 N. Y. 460; *Field v. Munson*, 47 id. 223, and *Fabbri v. Ins. Co.*, 55 id. 133. The cases are numerous which sanction the introduction of evidence which will cast light upon those terms in the contract which are not clear and explicit, and serve to explain what the real intention of the parties was. This rule has been held to apply particularly to insurance cases of an analogous character where the language is uncertain and ambiguous as to the interest intended to be insured, and it is held that parol evidence is admissible to place the court in a position to be able to ascertain what interest the insured has, and what was intended to be covered by the policy. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 13. Numerous cases sustain the rule that admissions, whether oral or written, may be explained or contradicted by parol or other evidence. *DeLavallette v. Wendt*, 75 N. Y. 580; *Juilliard v. Chaffee*, 92 id. 535; *Ellis v. Willard*, 9 id. 531; *McMaster v. President, etc.*, 55 id. 228; *Stanton v. Miller*, 58 id. 203; *Smith v. Holland*, 61 id. 635. But inasmuch as the question here presented relates to the uncertainty and ambiguity of the indorsement on the envelope, it is unnecessary to invoke the application of this rule in order to sustain the decision of the court allowing the introduction of parol evidence."

6. In *Grierson v. Mason*, 60 N. Y. 394, the action was for an agent's guaranteed commissions, at a certain gross amount. Plaintiffs produced a written contract giving the agent the exclusive right to sell their goods for a specified commission, but not guaranteeing any amount. Parol evidence was allowed to show

that the sole purpose of the writing was to enable the agent to get advances from third parties. The court said: "This is in avoidance of the instrument, and not to change it. \* \* \* It would, I think, have been proper to show that the instrument was given up, and equally so that it did not constitute the entire contract, as it was only for a special purpose. So the grantor may show that the purpose of the deed was to enable the grantee, his agent, to confer title. *Collins v. Tillou's Adm.*, 26 Conn. 368; S. C. 68 Am. Dec. 398. And an insurance company may avoid its policy on goods insured to a husband, by showing that they belonged to his wife. *Agric. Ins. Co. v. Montague*, 38 Mich. 548; S. C. 31 Am. Rep. 326."

7. So evidence was held admissible to show that a bill of lumber was sent merely as a memorandum of the value to be accounted for on the settlement of a contract for building a boat, and not as a contract of sale.<sup>1</sup> The court said: "It was competent to show the purpose for which the bill was sent, to explain its real meaning and significance. If in fact there was a present sale of the lumber made out by other and undisputed evidence, then the purpose of sending the bill would be immaterial. But the plaintiff having used the bill as an admission of a prior sale, the explanation should have been allowed for the consideration of the jury. Even if the bill was made out concurrently with the contract and was part of the *res gestæ*, it is not a writing having such a complete and decisive character as would render the proposed evidence inadmissible. See *Hazard v. Loring*, 10 Cush. 267."

8. Under this head may properly be classed agreements entered into by mutual or unilateral mistake of fact, which do not express the real intention of the parties, and in accordance with the language of which the minds of the parties never coincided. So of contracts executed by those incapable of binding themselves absolutely, by reason of infancy, coverture, or want of reason.<sup>2</sup> So of contracts procured by duress.<sup>3</sup> So of a contract not executed by all the parties recited as executing it, and delivered on condition that all join.<sup>4</sup> So of contracts never delivered.<sup>5</sup> Or a contract signed by one apparently as agent but

<sup>1</sup> *Crosby v. President, etc.*, 128 N. Y. 641.

<sup>2</sup> *Webster v. Woodford*, 3 Day, 90.

*Mitchell v. Kingman*, 5 Pick. 431.

*Rice v. Peet*, 15 Johns. 503.

*Gore v. Gibson*, 13 M. & W. 623.

*Matthews v. Baxter*, L. R. 8 Ex. 132.

<sup>3</sup> *Stouffer v. Latshaw*, 2 Watts, 165.

*Thompson v. Lockwood*, 15 Johns. 256.

<sup>4</sup> *Chouteau v. Suydam*, 21 N. Y. 179.

<sup>5</sup> *Leppoc v. Nat. Un. Bank*, 32 Md. 136.



without authority.<sup>1</sup> Or a contract signed with a fictitious name.<sup>2</sup> Or a deed of lands in the adverse possession of another, or a claim purchased by an attorney for the purpose of suing, where such a thing is void by statute. So of papers never intended as a contract.<sup>3</sup> As of a memorandum made and read over to one party by the other, but not executed.<sup>4</sup> Or a memorandum of a lease signed by one only, stating that he was to give a lease for seven years, but stating no term.<sup>5</sup> Or a mere receipt for purchase money.<sup>6</sup> Or a mere power of attorney.<sup>7</sup> Or an indorsement of a note merely to transfer title, the indorsee orally agreeing not to hold the indorser.<sup>8</sup> Or a mere form intended to appear in a prospectus of a corporation, which the promoters were required by law to publish.<sup>9</sup>

9. But in *Wharton v. Christie*, 53 N. J. L. 607, Court of Errors and Appeals, it was held that if an employee, having been illegally discharged, send in his written resignation, and the same has been accepted by his employer, a suit will not lie in his behalf on the contract of service, and parol evidence is incompetent to destroy or impair such written contract. (This was laid down by seven judges against six.)

*Knowledge of mental incapacity.*—In case of the setting up of lack of reason as a defense to a contract, the plea must be accompanied by proof of knowledge thereof in the other party at the time of entering into the contract. As Holland observes: "The validity of a contract depends not on the consent of wills, but on the apparent consent of wills." Thus in *Imperial Loan Co. v. Stone*, 66 L. T. Rep. (N. S.) 556; in the Court of Appeal of England, this rule was laid down by the judges as follows: By Lord Esher, M. R.: "I shall not go through all the cases from the beginning, but as I think it would be well for this court to lay down an absolute rule, I will state my view of what is the result of all the cases. It is this: When a person enters into an ordinary contract, and afterwards alleges that

<sup>1</sup> *Sheffield v. Ladue*, 16 Minn. 388; S. C. 10 Am. Rep. 145.

<sup>2</sup> *Bartlett v. Tucker*, 104 Mass. 336; S. C. 6 Am. Rep. 240.

<sup>3</sup> *Jones v. Hardesty*, 10 G. & J. 404; S. C. 32 Am. Dec. 180.

*Heffron v. Pollard*, 73 Tex. 96; S. C. 15 Am. St. Rep. 764.

<sup>4</sup> *Lathrop v. Bramhall*, 64 N. Y. 365.

<sup>5</sup> *Thomas v. Nelson*, 69 N. Y. 118.

<sup>6</sup> *Perrine v. Cooley's Exr's*, 39 N. J. L. 449.

*Irwin v. Thompson*, 27 Kans. 643.

<sup>7</sup> *Hutchins v. Hebbard*, 34 N. Y. 24.

<sup>8</sup> *Bruce v. Wright*, 5 Thomp. & Cook, 81.

<sup>9</sup> *Branson v. Oregonian Ry. Co.*, 11 Oreg. 161.

he was so insane at the time he did so that he did not know what he was doing, though he proves that to be so, the contract is as binding on him in every respect and to every extent as if he had been fully sane, unless he also prove that at the time of making the contract, the person he contracted with knew him to be so insane as not to know what he was doing. For many years it has been the law that a plea that the defendant was so insane at the time of entering into the contract that he did not know what he was doing has been held not to be a good plea, unless there was an averment of the plaintiff's knowledge of this insanity of the defendant. The necessity of this last averment could not be supported unless the law is what I have stated. The defendant must prove, besides the fact of his insanity, the fact that the plaintiff knew of it." By Fry, L. J.: "In *Molton v. Camroux* 2 Ex. 487; (affirmed on error by the Court of Exchequer Chamber) Pollock, C. B., at p. 502, says: 'On looking into the cases at law we find that in *Brown v. Jodrell*, 3 C. & P. 30, Lord Tenterden says: 'I think the defense (of unsoundness of mind) will not avail, unless it be shown that the plaintiff imposed on the defendant.' In *Baxter v. Earl of Portsmouth*, 5 B. & C. 170, Abbott, C. J., with the concurrence of the rest of the court, laid down the same doctrine. In *Dane v. Viscountess Kirkwall*, 8 C. & P. 679, Patteson, J., in directing the jury, said: 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it.' On the old rule, therefore, has been engrafted this exception, that when a defendant can show himself to have been *non compos mentis* at the date of the contract, and can show also that the plaintiff knew of this fact, then, and then only, he can avoid his contract." By Lopes, L. J.: "The result of the authorities on this branch of law may, I think, be summed up thus: A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity the mental incapacity of the one must be known to the other party. A defendant must plead and prove both his insanity and the knowledge of the plaintiff; the burden of proof of both those facts lies on the defendant."

## CHAPTER VII.

## LEGALITY OF AGREEMENTS.

- SEC. 34. Contract apparently valid.  
35. Executed illegal contract.  
36. Contract apparently invalid.

**Sec. 34. Contract apparently valid.**

Parol evidence is competent to show that an executory contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law.

*Illustrations:* 1. This principle was laid down in a learned discussion in *Martin v. Clarke*, 8 R. I. 389; S. C. 5 Am. Rep. 586, where the court, in an action to compel specific performance of a contract between attorney and client, approved the admission of extrinsic evidence to show that it was champertous. The court said that "the rule excluding parol evidence will not prevent a court, either of law or of equity, from looking through all disguises in order to detect fraud or illegality, and from inquiring into the true nature of the transaction and the intent of the parties in this regard." Citing *Collins v. Blantern*, 2 Wils. 341, and *Paxton v. Popham*, 9 East, 416.

2. So in *Donley v. Tindall*, 32 Tex. 43; S. C. 5 Am. Rep. 234, an action on a promissory note, it was held that parol evidence was admissible to show that the real undertaking was that the note should be paid in Confederate money, though not so expressed in the instrument. The court said: "It is admitted by those who differ with me on this question, that if the character of the agreement as pleaded appeared upon the face of the instrument, there could be no question in that case of its viciousness and condemnation. I have stated the *general* rule to be that the operation of parol evidence in cases of written contracts is confined within the strict limits of exposition or interpretation, but have at the same time shown that this rule is based upon the assumption that the instrument has a *legal* existence, and is valid.

This position will be found most amply sustained in the following cases: *Mann v. Eckford's Executors*, 15 Wend. 518; *Parker v. Parmele*, 20 Johns. 134; *Vrooman v. Phelps*, 2 Johns. 177; *Paxton v. Popham*, 9 East, 408. See also the authorities to which these decisions refer."<sup>1</sup>

3. So it was held of a lease of premises to be used for an unlawful purpose.<sup>2</sup> So of a contract for sale of goods, but really a mere wager-contract.<sup>3</sup> The court here said: "The statute against wager-contracts would be of small value if the truth could not be shown by extrinsic evidence, and it was competent to give such evidence." A very common example is an usurious contract. So of a contract in consideration of past or present illicit intercourse.<sup>4</sup> So of a contract to divide fees of office.<sup>5</sup> And of a bond to stifle a prosecution for perjury.<sup>6</sup>

### Sec. 36. Executed illegal contract.

But an executed illegal contract may not be impeached by any party to it.<sup>7</sup>

<sup>1</sup> To the same effect, *Waymack v. Heilman*, 26 Ark. 449.

*Patton v. Gilmer*, 42 Ala. 548; S. C. 94 Am. Dec. 665.

*Lazare v. Jacques*, 15 La. Ann. 599.

*Wolf v. Fletemeyer*, 83 Ill. 418.

*Henderson v. Palmer*, 71 Ill. 579; S. C. 22 Am. Rep. 117.

*Buck v. First Nat. Bank*, 27 Mich. 293; S. C. 15 Am. Rep. 189.

*Peed v. McKee*, 42 Iowa, 689; S. C. 20 Am. Rep. 631.

*Fenwick v. Ratliff*, 6 T. B. Monr. 154.

<sup>2</sup> *Sherman v. Wilder*, 106 Mass. 537.

<sup>3</sup> *Peck v. Doran & Wright Co.* 57 Hun, 343.

In "A Treatise on Contracts for Future Delivery and Commercial Wagers, including 'Options, Futures and Short Sales,'" by T. Henry Dewey, of the New York bar, the author contends that in a case where the contract is in writing, and the understanding that no delivery is to be made is not expressed, parol evidence is inadmissible to establish the fact. I do not so understand the rule. The evidence is admissible, not for the purpose of contradicting

the agreement in writing, but for the purpose of showing that the intent of the parties was merely to gamble; notwithstanding it may have the effect to vary the terms of the writing. Again it has been held that evidence to establish any defect of this character (illegality) in the alleged contract does not come within the spirit or the letter of the rule excluding parol evidence. *Jones Const. Cont.* § 191, citing authorities. See also *Kreigh v. Sherman*, 105 Ill. 49, and *Stewart v. Schall*, 65 Md. 289.

<sup>4</sup> *Beaumont v. Reeve*, 8 Ad. & Ell. (N.S.) 483. Held to the contrary as to past cohabitation.

*Brown v. Kinsey* 81 N. C. 245.

<sup>5</sup> *Gray v. Hook*, 4 Comst. 449.

<sup>6</sup> *Collins v. Blantern*, 2 Wils. 341.

<sup>7</sup> *Ayerst v. Jenkins*, 16 Eq. 275.

*Marksbury v. Taylor*, 10 Bush, 519.

*Denton v. English*, 2 Nott & McC. 581.

*Fletcher v. Watson*, 7 Gratt. 16.

*White v. Hunter*, 23 N. H. 128.

*Bivins v. Jarnigan*, 3 Baxt. 282.

*Gisaf v. Neval*, 81 Pa. St. 354.

*Hill v. Freeman*, 73 Ala. 200.

*Reason of the rule:* While the law refuses its aid in the enforcement of an illegal contract, for the reason that it will not assist in defeating its own beneficent rules and promoting injustice, it equally refuses to relieve a party to the unlawful agreement who has suffered by the enforcement of it. The law will prevent wrong from being done, but when it is done it leaves the party to his fate. Thus although the law will refuse to aid one in recovering a bet from the loser or stakeholder, or unlawful interest from the debtor, yet the wager or the interest being paid it will not, in the absence of a different statutory regulation, lend its process for the recovery again. The familiar maxims on this point are, "*In pari delicto potior est conditio defendentis*," "*Audiendus nemo allegans suam turpitudinem*," and "*Ex turpi causa non oritur actio*."

Of the last maxim Lord Justice Lindley recently observed: "This old and well-known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offenses. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson*, Cowp. 343. In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial shows conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal

contract. Any rights which he may have irrespective of his illegal contract will of course be recognized and enforced. But his illegal contract confers no rights on him. See *Pearce v. Brooks*, L. R. 1 Ex. 213. The illegal purposes of the plaintiff distinguish this case from *Wetherell v. Jones*, 3 B. & Ad. 221, and others of a similar kind. I am quite aware that what the plaintiff has done is very commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal."

In *Collins v. Blantern*, 2 Wils. 341, Wilmot, C. J., said: "This is a contract to tempt a man to transgress the law; to do that which is injurious to the community; it is void by the common law; and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, O! procul este profani!*"

### Sec. 36. Contract apparently invalid.

Parol evidence is admissible to show that a contract apparently invalid is really valid.

*Illustrations:* As to show the understanding that only legal interest was to be charged when the contract calls for illegal interest.<sup>1</sup> The court said: "It is in virtue of its superior obligation that a written contract has the effect of extinguishing the verbal contract upon which it is founded; and of course where it has no obligation whatever, it can have no such effect."<sup>2</sup> So a usurious contract may be purged by a subsequent oral agreement.<sup>3</sup> So evidence is admissible to show that the consideration arose in a state where it was lawful.<sup>4</sup>

*Contrary doctrine:* But in *Porter v. Havens*, 37 Barb. 343, where there was an agreement that the notes in suit were to be executed and placed in escrow and not to be delivered until cer-

<sup>1</sup> *Roosevelt v. Dreyer*, 12 Daly, 370.

<sup>2</sup> *Lear v. Yarnel*, 3 Marsh. (Ky.) 421.

*Boorman v. Jenkins*, 12 Wend. 573.

<sup>3</sup> *De Wolf v. Johnson*, 10 Wheat. 367.

<sup>4</sup> *Western, etc., Co. v. Kilderhouse*, 87 N. Y. 430.

tain criminal prosecutions against the maker should be "discontinued and ended," and were to be delivered only on the condition that the payee should not arrest the maker, but should cease all proceedings against him, parol evidence was held inadmissible to show that the consideration was not to compound a criminal offense nor unlawful.

*Reason of the rule:* This latter doctrine is clearly unsound. It would convert the technical rule excluding parol evidence into an instrument of wrong-doing. It would be a strange inconsistency if parol evidence should be admitted, as it uniformly is, to prevent wrong by showing that a contract is for an illegal purpose, and yet exclude it when offered to show that the contract is legal, and thus prevent the law from effecting the right.

Where the contract is not unlawful, but is apparently invalid for want of consideration, the fact of consideration may be supplied by parol. As in the case of a voluntary subscription, the contract may be upheld by proof that the promisee has expended money or incurred expense on the faith of it.<sup>1</sup>

<sup>1</sup> *Philomath College v. Hartless*, 6 Oreg. 158; S. C. 25 Am. Rep. 510.

## CHAPTER VIII.

## FRAUD.

- SEC. 37. Actual fraud, undue influence, duress.  
 38. Constructive fraud.  
 39. Exception as to wills.

**Sec. 37. Actual fraud, etc.**

An instrument may be avoided for fraud, undue influence, gross inequality, or duress, by the party to it thus defrauded or overcome, or by a third party whom it was executed to defraud.<sup>1</sup>

"It is a known rule of law that no man shall take advantage of his own wrong.

"Nec lex est justior ulla  
 Quam necis artifices arte perire sua."?"

"Fraud may be said to consist, on the one hand, (1) in one man's endeavoring by deception to alter another man's general rights, or (2) in one man's endeavoring by circumvention to alter the general rights of another; or on the other hand, (3) in one

<sup>1</sup> Juzan v. Toulmin, 9 Ala. 662; S. C. 44 Am. Dec. 448.

Burch v. Smith, 15 Tex. 219; S. C. 65 Am. Dec. 154.

Moore v. Pierson, 6 Iowa, 279; S. C. 71 Am. Dec. 409.

Davis v. McNalley, 5 Sneed, 583; S. C. 73 Am. Dec. 159.

Jackson v. King, 4 Cow. 207; S. C. 15 Am. Dec. 354.

Owing's case, 1 Bland. Ch. 370; S. C. 17 Am. Dec. 311.

Smith v. Beatty, 2 Ired. Eq. 456; S. C. 40 Am. Dec. 435.

Tracey v. Sackett, 1 Ohio St. 54; S. C. 59 Am. Dec. 610.

Sutton v. Reagan, 5 Blackf. 217; S. C. 33 Am. Dec. 466.

Twambley v. Rickard, Mass.

Mallory v. Leach, 35 Vt. 156; S. C. 82 Am. Dec. 625.

Cameron v. Cameron, 15 Wis. 1; S. C. 82 Am. Dec. 652.

Powelton Coal Co. v. McShain, 75 Pa. St. 238.

Kilmer v. Smith, 77 N. Y. 226; S. C. 33 Am. Rep. 613.

Coffman v. Lookout Bank, 5 Lea, 232; S. C. 40 Am. Rep. 31.

McCormick v. Miller, 102 Ill. 208; S. C. 40 Am. Rep. 577.

Montgomery v. Scott, 9, S. C. 20; S. C. 30 Am. Rep. 1.

Ewing v. Smith, Ind. 31 N. E. Rep. 464.

Cooper v. Finke, 38 Minn. 2.

<sup>2</sup> Gibson v. Minet, 1 H. Bl. 585.



man's endeavoring by deception to alter another man's particular rights, or (4) in one man's endeavoring by circumvention to alter the particular rights of another man. And this may be compassed into the following: Fraud consists in endeavor to alter rights, by deception touching motives, or by circumlocution not touching motives."<sup>1</sup>

In *Chesterfield v. Jamesen*, 2 Ves. 155, Lord Hardwicke defined fraud as follows: "Firstly, actual fraud, or *dolus malus*, arising from facts and circumstances of imposition; secondly, fraud arising from the intrinsic nature and subject of the bargain; thirdly, fraud which may be presumed from the circumstances and condition of the parties contracting; fourthly, fraud which may be collected and inferred from the matter and circumstances of the transaction, as being an imposition and cheat on other persons not parties to the transaction."

The law abhors fraud, and equity relieves against it. Where law and equity are separately administered it is necessary to appeal to equity for practical help, in spite of the law's theoretical hatred of fraud, but where they are administered in the same court, the fraud may be alleged and proved as a defense even in an action to enforce the fraudulent instrument. The effectuation of this purpose is a common and one of the most beneficial offices of parol evidence. The instances of its admission are almost innumerable; it pertains to many legal and natural relations; and the variety of circumstances in which it has been resorted to is sufficient to warrant a separate treatise, which has been very intelligently furnished by Mr. Kerr, under the title of "Fraud and Mistake." The relation of debtor and creditor gives rise to the most frequent interposition of equity for relief.<sup>2</sup>

*Contracting not to set up fraud in defense:* The strictness with which the law applies the principle that fraud vitiates a contract is strikingly illustrated in a recent and novel case in the Supreme Court of New York, *Universal Fashion Co. v. Skinner*, 64 Hun,

<sup>1</sup> Bigelow Fraud, 5.

<sup>2</sup> Sir Giles Overreach, in Massinger's drama, "A New Way to Pay Old Debts," need not have been so distracted on discovering how Marrall had treacherously contrived with "certain minerals incorporated in the ink and wax" to "raze out the conveyance" and leave nothing but "a fair skin of parchment" with "neither

wax nor words." A little Shakespearian law-learning would have taught him that equity would have helped him out by parol evidence, without resorting to the statute against witchcraft with which he threatened his unfaithful clerk, if the instruments were not illegal, and if they were, there was no need of the pious fraud to defeat them. But as a rule, the drama knows no law.

294. The plaintiff sued the defendant Skinner for goods sold under a written contract which contained a clause stating that its stipulations contained the whole contract, and that any terms different therefrom or supplemental thereto should bind neither party. Skinner's answer admitted the contract, but alleged, in avoidance, the fraud of the company's agent; that the agent stated that the goods were new to the city where they were to be sold; that they were to be merchantable, and that Skinner was to be the sole agent in that city; and that these representations were false. The plaintiff demurred to the answer. It was held that as by the demurrer it was admitted that the representations of the agent were false, the contract based upon them was void. O'Brien, J. dissenting, set forth the provision of the contract in question as follows: "That no terms or conditions different therefrom, or supplemental thereto, shall be binding upon either party, and that all statements and representations not hereinbefore expressed in writing shall be absolutely inoperative to effect the right of either party hereto;" cited *Seitz v. Brewers', etc., Co.*, 6 N. Y. L. J. 631, and *Eighmie v. Taylor*, 98 N. Y. 288; and urged: "Under this rule, where the parties themselves stipulate that the writing contains the entire contract, it is difficult to see upon what theory contemporaneous oral agreements or representations are admissible to vary a written contract." But Van Brunt, P. J., said. "The provisions of the fourth section of the contract add nothing to its force, as the law implies the same; the demurrer admits that the defendant was induced to enter into the contracts by false and fraudulent representations. The fact of the representations being made by an agent, and not by the principal, does not alter the question, as there is no proof that the agent was not authorized to make the representations, and besides, if a party is induced to enter into a contract by false representations upon the part of an agent the principal cannot claim the contract freed from the representations." And Andrews, J. observed: "If the construction of section 4 of the contract contended for by plaintiff's counsel is correct, that section is an agreement that the plaintiff shall not be liable for the fraud of its own agent. Such an agreement cannot be enforced." The decision seems to be sound, but the observation of the presiding judge that the peculiar provision of the contract "adds nothing to its force, as the law implies the same," seems incorrect, for the law does not conclusively imply that the paper contains the whole contract, nor

prohibit the parties from agreeing that no supplemental terms shall be introduced by parol.

*Relations enabling the operation of fraud, etc.:* Kerr says (Fraud and Mistake, p. 192): "The jurisdiction of the court in relieving against transactions on the ground of undue influence has been exercised as between a medical man and a patient; as between the keeper of a lunatic asylum and a patient under his care; as between a minister of religion and a person under his spiritual influence; as between a spiritualist medium and an old lady; as between a young man in the army, just come of age, and his superior officer; as between husband and wife; as between a man and a lady to whom he was about to be married; as between a man and a woman with whom he was living; as between brother and sister; as between two brothers; as between an elder and a younger brother just come of age; as between an uncle and his nephew who was deaf and dumb; as between an uncle, who was in such a state of bodily and mental imbecility as rendered him incapable of transacting business requiring deliberation and reflection, and a nephew; as between nephew and aunt, or aunt and niece; as between a young man just come of age, and a man who had acquired an influence over him during his minority; as between a young man of intemperate habits and a person with whom he was living; as between an unmarried woman and her brother-in-law; as between an old lady and a woman living with her in the capacity of a companion or domestic; as between a child and an imbecile parent;" etc.<sup>1</sup>

*Illustration:* In *Ewing v. Smith*, — Ind. —, a son, who had just attained his majority, who had no knowledge of business, and who was intemperate, and easily influenced, was induced by his father, a wealthy man, of large experience and force of character, to convey to him, for the expressed consideration of \$600,

<sup>1</sup> *Allen v. Davis*, 4 DeG. & Sm. 133.  
*Wright v. Proud*, 13 Ves. 136.  
*Norton v. Rely*, 2 Edm. 286.  
*Lyon v. Home*, 16 W. R. 824.  
*Lloyd v. Clark*, 6 Beav. 309.  
*Lambert v. Lambert*, 2 Brown P. C. 18.  
*Page v. Horne*, 11 Beav. 227.  
*Coulson v. Allison*, 2 D. F. & J. 521.  
*Sharp v. Leach*, 31 Beav. 491.  
*Sturge v. Sturge*, 12 Beav. 229.  
*Sercombe v. Sanders*, 34 Beav. 382.

*Harvey v. Mount*, 8 Beav. 439.  
*Tate v. Williamson*, L. R. 2 Ch. App. 55.  
*Ferres v. Ferres*, 2 Eq. Ca. Ab. 695.  
*Willan v. Willan*, 2 Dow. 274.  
*Griffiths v. Robins*, 3 Madd. 191.  
*Anderson v. Elsworth*, 3 Giff. 154.  
*Grosvenor v. Sherratt*, 28 Beav. 661.  
*Terry v. Wachter*, 15 Sim. 447.  
*Rhodes v. Bate*, L. R. 1 Ch. Ap. 252.  
*Cole v. Gibson*, 1 Ves. 503.  
*Whelan v. Whelan*, 3 Cow. 538.

all his property, in trust for himself for life, remainder to his personal representatives. There was no actual consideration for the deed. The father subsequently reconveyed the property, and the son conveyed the land in controversy to *bona fide* purchasers, after which he died. *Held*, that his legal representatives had no title to the land that equity would enforce, as the deed of trust was unconscionable, was procured by fraud and undue influence and was revoked by the reconveyance. The court said: "There can be no doubt that where there is fraud or mistake in executing or securing the execution of a conveyance for which no consideration is paid, parol evidence is competent. In this case the character of the instrument, with very slight additional evidence, fully opened the way to the admission of conversations between the grantor and grantee. We think it very clear that there was no error in admitting parol evidence, nor in refusing to instruct the jury that they could not regard such evidence."

### Sec. 38. Constructive fraud.

Where one occupies a position of trust for, or sustains a relation of legal or natural authority or influence over, another, any gift or benefit from the latter to the former, or any financial settlement between them, is presumptively void, and can be enforced or retained only upon the clearest proof of good faith on the part of the former, and of understanding and intention on the part of the latter.<sup>1</sup>

The donee must satisfy the court, in a suit brought to set aside the gift, that the donor had competent and independent advice in conferring the benefit, that he fully understood the nature of the transaction, and that no undue influence was practiced, and this independent of age, sex, mental infirmity and other incapacity. The rule extends to gifts from children to parents and settlements between guardians and wards, not only in minority, but shortly after minority, while the influence and control may be supposed still to subsist. The leading cases on this point are cited below.<sup>2</sup>

<sup>1</sup> See *Huguenin v. Baseley*, and notes, 2 W. & T. Lead. Cas. in Eq. 1156, 4th Am. ed.

<sup>2</sup> *Husband and wife* :

*Haydock v. Haydock*, 34 N. J. Eq. 570; S. C. 38 Am. Rep. 385.

*Boyd v. De La Montagnie*, 73 N. Y. 498; S. C. 29 Am. Rep. 197.

*Darlington's Appeal*, 86 Pa. St. 512; S. C. 27 Am. Rep. 726.

*Shipman v. Furniss*, 69 Ala. 555; S. C. 44 Am. Rep. 528.

### Sec. 39. Constructive fraud as to wills.

The doctrine of constructive fraud does not apply to a will.<sup>1</sup>

In *Tyson v. Tyson's Exrs.*, 37 Md. 583, it is said: "The influence which is undue in cases of *gifts inter vivos*, is very

#### *Affanced parties :*

- Kelly v. McGrath, 70 Ala. 75; S. C. 45 Am. Rep. 75.  
 Butler v. Butler, 21 Kans. 521; S. C. 30 Am. Rep. 441.  
 Hamilton v. Smith, 59 Iowa, 15; S. C. 42 Am. Rep. 39.  
 Hall v. Carmichael, 8 Baxt. 211; S. C. 35 Am. Rep. 696.  
 Gilmore v. Burch, 7 Oreg. 374; S. C. 33 Am. Rep. 710.  
 Pierce v. Pierce, 71 N. Y. 154; S. C. 27 Am. Rep. 22.  
 Kline v. Kline, 57 Pa. St. 120, 98 Am. Dec. 206.  
 Wollaston v. Tribe, L. R. 9 Eq. 44.  
 Falk v. Turner, 101 Mass. 494.  
 Rockafellow v. Newcomb, 57 Ill. 186 (case of man complaining of woman.)  
 Russell's Appeal, 75 Pa. St. 279.  
*Parent and child :*  
 Wood v. Rabe, 96 N. Y. 414; S. C. 48 Am. Rep. 640.  
 Bainbridge v. Browne, 44 L. T. Rep. (N. S.) 705.  
 Noble's Adm'r v. Moses, 81 Ala. 530; S. C. 60 Am. Rep. 175.

#### *Contra as to grandparent and grand-child :*

- Cowee v. Cornell, 75 N. Y. 91; S. C. 31 Am. Rep. 428.

#### *Persons in loco parentis :*

- Berkmeyer v. Kellerman, 32 Ohio St. 239; S. C. 30 Am. Rep. 577.

#### *Executor and legatee :*

- Leach v. Leach, 65 Wis. 284, 26 N. W. Rep. 755.

#### *Administrator and distributee :*

- Williams v. Powell, 66 Ala. 20; S. C. 41 Am. Rep. 742.

#### *Brother and sister :*

- Gillespie v. Holland, 40 Ark. 28; S. C. 48 Am. Rep. 1.

#### *Physician and patient :*

- Popham v. Brooke, 5 Russ. 8.  
 Dent v. Bennett, 4 My. & Cr. 269.  
 Billage v. Southee, 9 Hare, 534.  
 Cadwallader v. West, 48 Mo. 483.  
 Crispell v. Dubois, 4 Barb. 393.  
 Woodbury v. Woodbury, 141 Mass. 329; S. C. 55 Am. Rep. 479.  
*Contra :* Audenreid's Appeal, 89 Pa. St. 114; S. C. 33 Am. Rep. 731.

#### *Guardian and ward :*

- Ferguson v. Lowery, 54 Ala. 510; S. C. 25 Am. Rep. 718.  
 Bickerstaff v. Marlin, 60 Miss. 509; S. C. 45 Am. Rep. 418.

#### *Equitable wardship :*

- Jacox v. Jacox, 40 Mich. 473; S. C. 29 Am. Rep. 547.

#### *Attorney and client :*

- Dickinson v. Bradford, 59 Ala. 581; S. C. 31 Am. Rep. 23.  
 Stout v. Smith, 98 N. Y. 25; S. C. 50 Am. Rep. 632.

#### *Minister and parishioner, or religious adviser and disciple :*

- Norton v. Rely, 2 Eden, 286.  
 Connor v. Stanley, 72 Cal. 556; S. C. 1 Am. St. Rep. 84.  
 Finnegan v. Theisen, Mich. 52 N. W. Rep. 619.

<sup>1</sup> Bancroft v. Otis, 91 Ala. 279; S. C. 24 Am. St. Rep. 904.

Smith's Will, 95 N. Y. 523.

Tyson v. Tyson's Exrs., 37 Md. 583.

Parfitt v. Lawless, L. R. 2 P. & D. 462.

Mackall v. Mackall, 135 U. S. 167.

Wheeler v. Whipple, 44 N. J. Eq. 142.

Post v. Mason, 91 N. Y. 539.

different from that which is required to set aside a will. In the former the *natural* influence which such relations as those in question involve, is considered *undue*, provided it is exerted to obtain a benefit for themselves, whereas in the case of a will the *influence* which the law considers as *unlawful* must be such as amounts to force and coercion, destroying the free agency of the testator."

*Contra:* Jackson v. Ashton, 11 Pet. 255.  
Greenfield's Estates, 12 Harris, 232.

*Agent and principal:*

Hall v. Knappenberger, 97 Mo. 509; S. C. 10 Am. St. Rep. 337.

*Contra* as to mere confidential friends :

Pressley v. Kemp, 16 S. C. 334; S. C. 42 Am. Rep. 635.

Hemingway v. Coleman, 49 Conn. 390; S. C. 44 Am. Rep. 243.

The most singular case under this head is Lyon v. Home, L. R. 6 Eq. 653 (A. D. 1868). which was a suit to set aside transfers of stock and a mortgage, of the value of £60,000, made by a childless widow, above seventy years of age, to a spiritualistic medium of the male sex, who persuaded the plaintiff to execute the transfers under the influence of communications which he pretended to have received from the spirit of her dead husband, indicated by rappings, and which informed the widow that the spirit loved the defendant and that he was his son, and charged her to make him hers. The widow appears to have been superstitious, credulous and affectionate; also ignorant, for she spoke of the defendant's aristocratic friends as "them high folks." She even at one time "contemplated the possibility of warmer relations" than the parental and filial. At one time he offered to return to her a check of £50 which she had given him, but finally consented to keep it, as reluctantly as Cæsar took the kingly crown upon the Lupercal. He finally took her name instead of her taking his. She put her arm around his neck and fondled him

while the parchments were being read. The heavenly voice kept urging her to love Charles. She had always had a vision of a son like this with golden hair. On one occasion when £24,000 were transferred to him, "there were no manifestations," swore the defendant, but on their way to the city in a cab, "the plaintiff sat very near me, with my hands in hers, under her shawl, all the way to the city," and she spoke of the conjuror at the broker's office as her adopted son. "This, without more," says the vice-chancellor, "is in my judgment enough to throw upon the defendant the *onus* of proving that plaintiff's acts were the pure, voluntary, well-understood acts of her mind, unaffected by the least spark of imposition or undue influence, or as Lord Eldon has expressed it, 'acts of rational consideration, of pure volition, uninfluenced.'" The vice-chancellor winds up by saying: "The system, as presented by the evidence, is mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish and the superstitious; and on the other to assist the projects of the needy and the adventurers; and lastly, that beyond all doubt there is plain law enough and plain sense enough to forbid and prevent the retention of acquisitions such as these by any medium, whether with or without a strange gift; and that this should be so is of public concern, and to use the words of Lord Hardwicke, 'of the highest public utility.'" Home was undoubtedly the ablest conjuror since Cagliostro.

## CHAPTER IX.

## MISTAKE.

Sec. 40. As to collateral fact.

41. In deeds.

42. Mistake of fact by insurer.

43. Reformation for mistake of fact.

44. Reformation for mistake of law.

**Sec. 40. Mistake as to collateral matter.**

A mutual mistake as to a fact wholly collateral and not affecting the essence of the contract will not invalidate the contract.

*Illustration:* Thus a mutual mistake as to the health of a horse, is not a ground for rescinding a contract of purchase.<sup>1</sup> In this case the court said: "Such an error or mistake as that in no way affects the validity of the contract. In a case where there is a mutual mistake of the parties as to the subject matter of the contract, or the price and terms, going to show the want of a *consensus ad idem*, without which no contract can arise, such a defense may be made. But here the mistake of the defendants were in relation to a fact wholly collateral, and not affecting the essence of the contract itself. The vendees cannot escape from the obligations of their contract because they have been mistaken or disappointed in the quality of the article purchased. In the absence of a warranty the principle of *caveat emptor* applies, and the buyer takes the risk of quality upon himself."

**Sec. 41. As to deeds.**

Evidence of mere mistake is incompetent at law to contradict a deed.

*Illustrations:* As to quantity of land.<sup>2</sup> Or to show a differ-

<sup>1</sup> Wheat v. Cross, 31 Md. 99; S. C. 1 Am. Rep. 28.

<sup>2</sup> Jackson v. Bowen, 1 Cai. 358; S. C. 2 Am. Dec. 193.

Howes v. Barker, 3 Johns. 506; S. C. 3 Am. Dec. 526.

Kerr v. Calvit, Walker, 115; S. C. 12 Am. Dec. 537.

Clarke v. Lancaster, 36 Md. 196; S. C. 11 Am. Rep. 486.

Dale v. Smith, 1 Del. Ch. 1; S. C. 12 Am. Dec. 64.

ent limitation.<sup>1</sup> Or to show omission of a covenant.<sup>2</sup> Or to show a different location.<sup>3</sup> Or as to name.<sup>4</sup> Or to show that it was intended as a mortgage.<sup>5</sup>

## Sec. 42. As to insurance policies.

Parol evidence is competent to show a mistake either of insertion or omission, made by an insurer, in the application or in the policy, even in an action to enforce the policy, on the ground of estoppel.

It is extremely familiar doctrine, that where an insurance company sets up a false answer of the insured to questions in the application, as a defense to an action on the policy, and as constituting a breach of warranty in the policy, the insured may show by parol that he made true and correct answers, and that the agent of the insurer set down his answers incorrectly. The authorities to this proposition are exceedingly numerous, and are based on the theory of estoppel.<sup>6</sup>

*Limitation:* But evidence of a mere mistake in an insurance policy is not admissible at law in the absence of estoppel and waiver.

<sup>1</sup> *Holmes v. Simons*, 3 Desaus. 149; S. C. 4 Am. Dec. 606.

<sup>2</sup> *Christ v. Diffenbach*, 1 S. & R. 464; S. C. 7 Am. Dec. 624.

<sup>3</sup> *Hartt v. Rector*, 13 Mo. 497; S. C. 53 Am. Dec. 157.

<sup>4</sup> *Pitts v. Brown*, 49 Vt. 86; S. C. 24 Am. Rep. 114.

<sup>5</sup> *Inhab. of Reading v. Inhab. of Weston*, 8 Conn. 117; S. C. 20 Am. Dec. 97.

*Hale v. Jewell*, 7 Greenl. 435; S. C. 22 Am. Dec. 212.

<sup>6</sup> *Moliere v. Penn. F. Ins. Co.*, 5 Rawle, 342; S. C. 28 Am. Dec. 675.

*Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; S. C. 98 Am. Dec. 332.

*North Am. F. Ins. Co. v. Throop*, 22 Mich. 146; S. C. 7 Am. Rep. 638.

*Plumb v. Catt. M. Ins. Co.* 18 N. Y. 394; S. C. 72 Am. Dec. 526.

*Anson v. Winnesheik Insurance Co.* 23 Iowa, 84.

*Malleable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465.

*Hough v. City F. Ins. Co.* 29 Conn. 10.

*N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166.

*Patten v. Merchants' and Farmers' Fire Ins. Co.* 40 N. H. 383.

*Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

*Ætna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246.

*Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 517.

*Ins. Co. v. Williams*, 39 Ohio St. 584; S. C. 48 Am. Rep. 474.

*Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352; S. C. 25 Am. Rep. 780.

*Planters' Ins. Co. v. Myers*, 55 Miss. 479; S. C. 30 Am. Rep. 521.

*Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; S. C. 25 Am. Rep. 386.

*Flynn v. Equit. L. Ins. Co.* 78 N. Y. 568; S. C. 34 Am. Rep. 561.

*Grattan v. Met. L. Ins. Co.* 80 N. Y. 281; S. C. 36 Am. Rep. 617; 92 N. Y. 274; S. C. 44 Am. Rep. 372.

*McCall v. Phoenix Ins. Co.* 9 W. Va. 237; S. C. 27 Am. Rep. 558.



*Illustrations:* 1. In *Cooper v. Farmers' M. F. Ins. Co.*, 50 Pa. St. 299; S. C. 88 Am. Dec. 544, an action on a fire insurance policy, the defense was breach of warranty against incumbrances, by reason of judgments. On the trial the plaintiff offered evidence that he told the agent of the company, who filled up the application, that there were judgments against him, but that he did not know whether they would bind the machinery, which was the sole subject of insurance; and that the agent replied that he was under the impression that they were not such incumbrances as the inquiry contemplated, and so filled up the application with a negative answer. The policy contained a condition that any waiver must be manifested in writing by the secretary before breach, and that no agent had power to violate that condition. The court held that the warranty could not be shown to have been inserted by mistake, observing: "It is difficult to see how a contract, avowedly based upon an expressly asserted fact, can exist when the basis is gone," and cited *Jennings v. Chenango M. Ins. Co.* 2 Denio, 75; *Kennedy v. St. Lawrence M. Ins. Co.* 10 Barb. 285; *Glendale Woolen Co. v. Protection Ins. Co.* 21 Conn. 19; S. C. 54 Am. Dec. 309; *Holmes v. Charlestown M. Ins. Co.* 10 Metc. 211; S. C. 43 Am. Dec. 428; and distinguished *Harris v. Columbian Ins. Co.* 18 Ohio, 116; S. C. 51 Am. Dec. 448. It was also held that the policy could not be reformed for mistake, because the mistake was not mutual. The holding is sustainable only upon the want of power in the agent to estop the company. None of the cases cited sustain it on the ground of mistake, but they all are cases at law to enforce the policy.

2. The rule is also sustained,<sup>1</sup> where the attempt was to show that an insurance on freight generally was an insurance on freight carried. Where the attempt was to change the date of speaking a vessel from the 20th to the 27th.<sup>2</sup> Where the attempt was to show a mistake in the statement that the house was filled in with brick.<sup>3</sup> Where the attempt was to show an intention to insure different property.<sup>4</sup> Where the attempt was to show that the property was in a different place.<sup>5</sup>

<sup>1</sup> *Cheriot v. Barker*, 2 Johns. 346; S. C. 3 Am. Dec. 437.

<sup>2</sup> *Ewer v. Washington Ins. Co.* 16 Pick. 502; S. C. 28 Am. Dec. 258.

<sup>3</sup> *Fowler v. Aetna Fire Ins. Co.* 6 Cow. 673; S. C. 16 Am. Dec. 460.

<sup>4</sup> *Holmes v. Charlestown M. F. Ins. Co.* 10 Metc. 211; S. C. 43 Am. Dec. 428.

<sup>5</sup> *Bryce v. Lorillard Fire Ins. Co.* 55 N. Y. 240; S. C. 14 Am. Rep. 249.

### Sec. 43. Reformation for mistake of fact.

A court of equity may reform any agreement on clear evidence of mutual mistake of fact, or of such mistake on one side and fraud on the other; such evidence is also admissible where a plaintiff alleges such mistake and seeks to have the agreement enforced as corrected; and in an action for specific performance the defendant may give such evidence to show his own mistake or mutual mistake.<sup>1</sup>

Mistake may thus be urged offensively or defensively. It may be urged offensively either by a plaintiff to correct and enforce the agreement according to the original mutual understanding, in which case the proof must be of a mutual mistake; or it may be urged defensively by a defendant to avoid the alleged agreement, in which case the mistake may be of both parties or of the defendant alone, the effect in either instance being to show that the minds of the parties never met as alleged, and that there was no such agreement. This is the equitable and not the legal rule. A court of equity admits such evidence whether the purpose of

<sup>1</sup> Pom. Eq. Jur., 2d ed., § 858, *et seq.*

Kerr on Fraud and Mistake (Am. ed.)  
pp. 409, *et seq.*

Gillespie v. Moon, 2 Johns. Ch. 587;  
S. C. 7 Am. Dec. 559.

Baldwin v. Carter, 17 Conn. 201; S. C.  
42 Am. Dec. 735.

Newcomer v. Kline, 11 G. & Johns.  
457; S. C. 37 Am. Dec. 74.

Chamberlain v. Thompson, 10 Conn.  
243; S. C. 26 Am. Dec. 390.

Moore v. Vick, 2 How. (Miss.) 746; S.  
C. 32 Am. Dec. 301.

Chapman v. Allen, Kirby, 399; S. C. 1  
Am. Dec. 24.

Parsons v. Hosmer, 2 Root, 1; S. C. 1  
Am. Dec. 58.

Somerville v. Trueman, 4 Harr. &  
McH. 43; S. C. 1 Am. Dec. 389.

Coger v. M'Gee, 2 Bibb, 321; S. C. 5  
Am. Dec. 610.

Smith v. Allen, 1 Saxt. 43; S. C. 21  
Am. Dec. 33.

Dunham v. Chatham, 21 Tex. 231; S.  
C. 73 Am. Dec. 228.

McKelway v. Armour, 2 Stockt. Ch.  
115; S. C. 64 Am. Dec. 445.

Tesson v. Atlantic M. Ins. Co., 40 Mo.  
33; S. C. 93 Am. Dec. 293.

Phoenix F. Ins. Co. v. Gurnee, 1 Paige,  
278; S. C. 19 Am. Dec. 431.

Lippincott v. Louisiana Ins. Co., 3 La.  
546; S. C. 23 Am. Dec. 467.

Stout v. City F. Ins. Co., 12 Iowa, 371;  
S. C. 79 Am. Dec. 539.

Keith v. Globe Ins. Co., 52 Ill. 518; S.  
C. 4 Am. Rep. 624.

Welles v. Yates, 44 N. Y. 525.

Keisselbrack v. Livingston, 4 Johns.  
Ch. 144.

Meyer v. Lathrop, 73 N. Y. 315.

Paine v. Upton, 87 N. Y. 327; S. C.  
41 Am. Rep. 371.

Wyche v. Greene, 11 Ga. 159.

Norton v. Marden, 15 Me. 45; S. C. 32  
Am. Dec. 132.

Howland v. Blake, 97 U. S. 624.

Stockbridge Co. v. Hudson Co., 102  
Mass. 45.

the suit be to rectify or to rescind such agreement. Mr. Kerr says: "If \* \* \* there is an error in the reduction of the agreement into writing, so that the written instrument fails, through some mistake of the draftsman, either in matter of law or of fact, to represent the real agreement of the parties, or omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will correct and reform the instrument so as to make it conformable to the real intent of the parties." And this doctrine is extended to a conveyance executed to effectuate the agreement, which, says Mr. Kerr, "should by mistake give the purchaser less than the agreement entitled him to."

*Illustrations:* 1. This general doctrine was recognized in *Glass v. Hulbert*, 102 Mass. 24; S. C. 3 Am. Rep. 418, but was held to apply only where "the relief sought and granted was by way of restricting and not by enlarging the operation of the deed." It was held that on account of the statute of frauds, in the absence of fraud operating as an estoppel, equity could not reform a deed so as to make it embrace more lands than it conveyed. But the consideration of this subject is not within the purpose of this book. The Massachusetts doctrine has been elsewhere denied.

2. Grover, J., well states the doctrine in *Jackson v. Andrews*, 59 N. Y. 244: "To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established, and that this intention was frustrated, either from some fraud, accident, or mutual mistake of both parties."

3. In an action for the purchase price of land, where the defendant set up as a defense that the land conveyed was not the land which he intended and agreed to purchase, a charge to the jury, that if the defendant was negotiating for one thing and the plaintiff was selling another, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff, is correct."<sup>1</sup>

4. Where defendant executed to plaintiff a purchase-money mortgage on land, represented by the plaintiff, and believed by the defendant and stated in the warranty deed to be 187 acres, but which on subsequent survey proved to be only 157 acres, the

<sup>1</sup> *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 560.

deficiency being of greater value than the amount secured by the mortgage, on a bill to foreclose the mortgage, *held*, that the defendant was entitled to an abatement of the purchase money to the amount of the value of such deficiency.<sup>1</sup>

5. Where by mutual mistake 206 acres was conveyed as "about 222 acres, be the same more or less," the price being fixed at so much an acre, and a mortgage given for part, the grantee was held entitled to a corresponding abatement therefrom.<sup>2</sup>

6. In another case defendant A. contracted to convey to defendant B. certain premises subject to certain mortgages. B. assigned the contract to plaintiff. Without the consent or knowledge of B. or the plaintiff, A. inserted in the deed a clause binding the plaintiff to assume the payment of the mortgages. The plaintiff, supposing the deed conformed to the agreement, accepted it and put it on record. *Held*, that plaintiff could maintain an action to reform the deed by striking out that clause.<sup>3</sup>

"*More or Less*": The effect of the words "more or less" in respect to a mistake in quantity of land, is well summed up in *Wilson v. Randall*, 67 N. Y. 341, as follows: "The land which the vender in this case intended to convey, and which the vendee contracted to purchase, was clearly defined, and the words 'more or less,' inserted in the contract, indicated that the quantity was, or might be, uncertain. When a contract is made to sell a defined piece or parcel of land for an entire price, and following the description is a statement of the number of acres contained in the tract, without any covenant by the vender as to the quantity, it is held that the statement of quantity is mere matter of description, and that the contract is satisfied by a conveyance of the land within the boundaries stated, whether it contains more or less than the specified number of acres. *Mann v. Pearson*, 2 Johns. 37. And if the words 'more or less' are inserted, it is still more clear that the quantity was not of the essence of the contract. In *Faure v. Martin*, 7 N. Y. 210, where the agreement was to sell a certain farm containing 'ninety-six acres, be the same more or less, for the sum of sixty dollars per acre,' which in fact contained but eighty-six acres, and a deed was given with the same description, it was held that in the absence

<sup>1</sup> *Mendenhall v. Steckel*, 47 Md. 453; 28 Am. Rep. 481.

<sup>2</sup> *Kilmer v. Smith*, 77 N. Y. 226; 33 Am. Rep. 613.

<sup>3</sup> *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep. 371.

of fraud, mistake or representation, the vendee was not entitled to compensation for the deficiency. The same rule of construction was applied as in the case of *Mann v. Pearson*, and the court were of opinion that the words 'more or less' inserted in the description, indicated that the parties did not rely upon the statement of quantity, and that the purchaser was bound to pay for ninety-six acres at the price of sixty dollars an acre. This case was commented upon by Comstock, J., in *Belknap v. Sealey*, 14 N. Y. 143. and the construction given to the contract in *Faure v. Martin* is, at least, very strict in favor of the vendor, and we are not fully satisfied that it was the true interpretation of the agreement. Where the contract is to sell a farm at a certain price per acre, and following the description is a statement of the number of acres and the words 'more or less,' may it not mean that the quantity when ascertained, whether 'more or less' than that specified, shall be paid for at the price per acre mentioned in the agreement?"

#### Sec. 44. Mistake of law.

Equity will generally relieve either party against a mutual mistake of law affecting the written expression of their agreement, but not against a unilateral mistake of law, unless the mistake was brought about by or known to the other party; and not against a mutual or a unilateral mistake respecting the general law on the subject of their agreement.

*Illustrations:* Thus equity has relieved where a man, owing to a certain construction of the law, agreed to take a lease of his own property, or sold another an estate which belonged to the purchaser.<sup>1</sup> So where an administrator sold land of his intestate to B., both supposing the fee was conveyed, whereas only the equity of redemption passed.<sup>2</sup>

<sup>1</sup> *Cooper v. Phibbs*, 16 L. T. Rep. (N. S.) 683.

*Bingham v. Bingham*, 1 Ves. Sen. 126.

*Lansdown v. Lansdown*, Mose. 364.

<sup>2</sup> *Griffith v. Townley*, 69 Mo. 13; S. C. 33 Am. Rep. 476.

See *Hunt v. Rousmaniere*, 1 Pet. 15.

*Irick v. Fulton's Exrs.* 3 Gratt, 193.

*Brown v. Lamphear*, 35 Vt. 252.

*Champlin v. Laytin*, 1 Edw. Ch. 467;

18 Wend. 407; S. C. 31 Am. Dec. 382.

*Stapylton v. Scott*, 13 Ves. 425.

*Tyson v. Tyson*, 31 Md. 134.

*King v. Doolittle*, 1 Head, 77.

*Green v. M. & E. R. Co.* 12 N. J. Eq. 165.

*Woodbury Sar. Bank v. Charter Oak Ins. Co.* 31 Conn. 517.

*Longhurst v. Star Ins. Co.* 19 Iowa, 364.

*Explanation of the doctrine:* Mr. Pomeroy says (2 Eq. Jur. 2d ed., §§ 845, 846, 849): "If an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument *by means of a mistake of law* fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal effect of *the contract actually made*, but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract, which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the term or language employed in the writing. \* \* \* It has been said that whenever a mistake of law is common to all the parties, where they all act under the same misapprehension of the law, and make substantially the same mistake concerning it, this is a sufficient ground, without any other incidents, for the interposition of equity. No such general rule, in my opinion, can be regarded as established, or even suggested, by the weight of authority; and it is certainly contradicted by well considered

1 Story Eq. Jur. secs. 134, 138.

Notes, 15 Am. Rep. 171; 10 Am. Dec. 323.

Warden v. Tucker, 7 Mass. 449; S. C. 5 Am. Dec. 62.

Lawrence v. Beaubien, 2 Bailey, 623; S. C. 23 Am. Dec. 155.

Underwood v. Brockman, 4 Dana, 309; S. C. 29 Am. Dec. 407.

State v. Paup, 13 Ark. 129; S. C. 56 Am. Dec. 303.

Pitcher v. Hennessey, 48 N. Y. 424.

Sparks v. Pittman, 51 Miss. 511.

Trigg v. Read, 5 Humph. 529.

Freeman v. Curtis, 51 Me. 140.

Evants v. Strode, 11 Ohio, 480.

McNaughten v. Partridge, 11 Ohio, 223; S. C. 38 Am. Dec. 731.

Christie v. Sullivan, 50 Cal. 337.

Needles v. Burk, 81 Mo. 569; S. C. 51 Am. Rep. 251.

Jones v. Clifford, 3 Ch. Div. 792.

Reynell v. Sprye, 8 Hare, 253.

Baker v. Massey, 50 Iowa, 404.

Blakeman v. Blakeman, 39 Conn. 320.

Webb v. City Council, 33 Gratt. 175.

McKenzie v. McKenzie, 52 Vt. 271.

Green Bay Co. v. Hewett, 55 Wis. 96.

McMillan v. Paper Co. 29 N. J. Eq. 610.

Canedy v. Marcy, 13 Gray, 373.

Scales v. Ashbrook, 1 Metc. (Ky.) 358.

Larkins v. Biddle, 21 Ala. 252.

Clayton v. Freet, 10 Ohio St. 544.

McKay v. Simpson, 6 Ired. Eq. 452.

Oliver v. Ins. Co. 2 Curtis, 298.

Snell v. Ins. Co. 98 U. S. 85.

decisions of most able courts. \* \* \* It has been shown that where the general law of the land—the common *jus*—is involved, a pure and simple mistake in any kind of a transaction cannot be relieved. Also where a person correctly apprehends his own legal rights, interests and relation, a simple mistake as to the legal effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. \* \* \* Wherever a person is ignorant or mistaken with respect to his own antecedent or existing private legal rights, interests, estates, duties, liabilities or other relations, either of property or contract or personal *status*, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.” In *Cooper v. Phibbs*, 16 L. T. Rep. (N. S.) 683, Lord Westbury said: “It is said, *ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law—the ordinary law of the country; but when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law; but if parties contract under a mutual mistake and misapprehension as to their mutual and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties. The respondents believed themselves to be entitled, the petitioner believed that he was a stranger, to the property; the mistake is discovered and the agreement cannot stand.”

*Further illustrations:* 1. In *Benson v. Markoe*, 37 Minn. 30; S. C. 5 Am. St. Rep. 816, it was held that equity would relieve against a mistake of law in supposing that a deed had not covered certain premises, citing *Canedy v. Marcy*, 13 Gray, 373; *Stedwell v. Anderson*, 21 Conn. 139; *Cooke v. Husbands*, 11 Md. 492; *Clayton v. Freet*, 10 Ohio St. 544; *Remington v. Higgins*, 54 Cal. 620; *McMillan v. Paper Co.* 29 N. J. Eq. 610; *Pitcher v. Hennessey*, 48 N. Y. 424; *Walden v. Skinner*, 101 U. S. 577; *Stover v. Poole*, 67 Me. 223.

2. In *Lee v. Percival*, Iowa, 52 N. W. Rep. 543, the cause of action was a note signed “Herndon N. G. & L. Co., F. A. P., president; A. H., secretary.” It appeared that it was given for

the exclusive benefit of the company, that P. and H. intended only to bind the company, and that the plaintiff had no reason to suppose otherwise. It was held that the evidence was proper, and that a reformation of the note was warranted. The court said :

“ It is clearly shown that the note was given for the exclusive benefit of the company; that nothing was said before it was made that it should be signed by any one but the company; and that in signing it the defendants intended to bind the company only, and not themselves. The evidence satisfies us also that plaintiffs had no reason to believe that defendants would sign the note excepting as officers of the company, and did not expect them to do so. When plaintiffs desired the note they wrote to ‘ Alex. Hastie, secretary Herndon Natural Gas & Land Co.’ at Des Moines, inclosing the note in blank, and saying, ‘ Please have properly signed and returned to us,’ it cannot be said they were indifferent as to who signed it. Their dealings had been with the company. They had no ground for believing that any one but the company would pay its debts, and their request as to the manner of signing was no doubt designed to cause the note to be so signed as to bind the company. It is said by appellants that defendants are personally liable by their signature, and that parol evidence is not admissible to show that they intended to bind the company only. It is well settled in this state that a signature like those in question renders the signer individually liable, the addition of words denoting an official title being deemed a mere description of the person. *McCandless v. Canning Co.*, 78 Iowa, 161; *Heffner v. Brownell*, 70 Iowa, 591; 75 Iowa, 341; *Wing v. Glick*, 56 Iowa, 473; *Day v. Ramsdell*, 52 N. W. Rep. 208, and *Water Power Co. v. Ramsdell*, 52 N. W. Rep. 209 (decided at the present term of this court). It is also the rule that parol evidence is not admissible to show that such a signature was designed to bind the corporations of which the person signing was an officer, but that has no application to actions in equity, where the signature is alleged to be the result of a mistake, the correction of which is asked. Where such a mistake as a court of equity will correct is shown, the ordinary rules of practice in such courts will apply. It is said however that the mistake, if any, in this case, was one of law, which a court of equity will not correct. It may be conceded that defendants signed the note as they intended to sign it, and that they were mistaken only as to the legal effect of the form of signature they adopted. But it is not



true that courts of equity will not relieve against any mistake of law. On the contrary, it is well settled that such mistakes in the use of words to express a contract previously made may be corrected. 'Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draughtsman, either as to fact or as to law, does not fulfill that intention, or violates it, equity will correct the mistake, so as to produce a conformity to the instrument.' 1 Story Eq. Jur. § 115. 'If on the other hand, after making an agreement, in the process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement or by cancellation or reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument.' 2 Pom. Eq. Jur. § 845. The law as thus announced finds ample support in the authorities. 15 Amer. & Eng. Enc. Law, p. 642, note 3; Id. p. 643, notes 1, 2; Id. p. 644, notes 2, 3; Hunt v. Rousmaniere, 1 Pet. 13; Pitcher v. Hennessey, 48 N. Y. 420; Canedy v. Marcy, 13 Gray, 377; James v. Cutler, 54 Wis. 175; Stedwell v. Anderson, 21 Conn. 144; Green v. Railroad Co., 12 N. J. Eq. 166; Clayton v. Bussey, 30 Ga. 946; Remington v. Higgins, 54 Cal. 622; Kennard v. George, 44 N. H. 444; Beardsley v. Knight, 10 Vt. 185; Clayton v. Freet, 10 Ohio St. 545. The rule adopted by this court is in harmony with the authorities cited. In Stafford v. Feters, 55 Iowa, 485, it was said that the equitable rule that relief will not be granted to correct mistakes of law has no application to the language of a contract; and an indorsement on a promissory note was corrected to represent the real contract of the parties, and relieve defendant from liability. See also Nowlin v. Pyne, 47 Iowa, 293; Baker v. Massey, 50 Iowa, 399; Reed v. Root, 59 Iowa, 359; Courtright v. Courtright, 63 Iowa, 356; Hallam v. Corlett, 71 Iowa, 446; Jemison v. Insurance Co., 52 N. W. Rep. 185 (decided at present term). In this case the contract between the parties, as we must hold under the evidence, required payment to be made by the company. When time was given the note of the company only was required. When the note was

made, defendants affixed the signatures in question, because they supposed that to be the proper way to make the note of the company. Plaintiffs must have known the intent with which the note was signed, and must also have believed that it was the note of the company only, or else they received it fraudulently, knowing of the mistake of defendants."

3. So where husband and wife executed a deed of premises including their homestead, the grantors and the grantee being ignorant that the wife was by law part owner of the homestead, reformation was granted.<sup>1</sup>

4. The extent to which a mistake of law may be obviated by reformation is extremely well illustrated in *Pitcher v. Hennessey*, 48 N. Y. 415. The question was whether the phrase "risk of navigation" from Oswego to Martinsburgh via the Black river canal embraced the fact that the boat was too large to pass through the locks. Earl, Commissioner, observed: "Parties to an agreement may be mistaken as to some material fact connected therewith, which formed the consideration thereof or inducement thereto, on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draughtsman, or one party only, and it may be a mistake of law or of fact. Equity interferes, in such a case, to compel the parties to execute the agreement which they have actually made. Sometimes it happens that parties agree, as in the case above cited from *Peters*,<sup>2</sup> to carry out their agreement by an instrument which, by their mistake of the law, will not effectuate their intention. In such a case equity will not reform the instrument, or substitute another instrument which will, in law, give effect to their intention, because they adopted and agreed upon the particular instrument, and equity will not compel them to execute an agreement which they never agreed to execute, and thus make an agreement for them. But in this case the parties intended, according to the answer, to reduce their parol agreement to writing, and to embody it in the instrument; and either because they or their draughtsman did not understand the force of language, or because some language which they intended should have been inserted in the instrument was omitted by mis-

<sup>1</sup> *Parker v. Parker*, 88 Ala. 362; S. C.    <sup>2</sup> *Hunt v. Rousmaniere*, 1 Pet. 15.  
16 Am. St. Rep. 52.

take, their intention was not carried into effect, and the instrument failed to embody their agreement. It is claimed on the part of the plaintiff that if the mistake occurred because both parties misunderstood the meaning of the terms 'risk of navigation,' both parties believing that these terms would include the risk in question, then no reformation of the contract can be had. This claim is not well founded. When parties have made an agreement, and there is no allegation of any mistake in it, and in reducing it to writing, they, by mistake, either because they did not understand the meaning of the words used, or their legal effect, failed to embody their intention in the instrument, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it; and it matters not whether such a mistake be called one of law or of fact."

5. Where a bond is extended only by one member of a firm, but in the name of all, and all intending to be bound, equity will charge the other members.<sup>1</sup> The court adopted Chief Justice Marshall's opinion in *Hunt v. Rousmaniere*, "that when from the terms used in an instrument it fails to carry out the clear and manifest intention of the parties, it will be reformed in equity to meet that intention," and granted the relief sought, although the parties were mistaken in the legal effect of the instrument.

6. In *Tatem v. Powell* (Court of Chancery of New Jersey, May 20, 1892), a suit by the children of an intestate by a former wife against the widow and her son, it appeared that the widow released her dower in consideration that she have the income for life of one-third of the estate. The homestead was worth \$3,000. That at its sale it was stated by the commissioners that the widow desired to purchase it for a home, and that the heirs were willing. It was sold to the widow for \$1,580, and an absolute deed given. No money was paid, but the commissioners took a mortgage for the amount, reciting that the amount was a part of the dower assigned the widow. The widow gave a receipt remitting the interest on the amount so long as she "shall hold the title in fee simple." Defendants and a part of plaintiffs were present at the sale, and consented to what was done. Others were absent, some of whom were minors. The mortgage was never paid, and the widow, claiming to own the homestead in fee, deeded a part thereof to her son and co-defendant. It was found

<sup>1</sup> *McNaughten v. Partridge*, 11 Ohio, 223; S. C. 38 Am. Dec. 731.

from the evidence, which was in conflict, that the homestead was sold to the widow on the understanding between herself and the heirs present that she was to have its use for her life only, and that at her death it should be divided among the heirs of her deceased husband. *Held*, that the intent was to convey to the widow a life estate only, and as her co-defendant was present at the sale, his title was no better than that of the widow. The vice-chancellor said, among other things: "Just here it should be observed that Arthur Powell, the ancestor, had two wives, and the Ellis family were descendants of the first wife, and consequently cannot take by descent from Mrs. Powell. This state of things renders it difficult to believe that the Ellis family could have acted upon the supposition that at the death of their step-grandmother they would take anything from her by descent. They could not have actively aided or acquiesced in an arrangement by which she bought the property of their grandfather at half its value, upon the idea that it would make no difference in the end, because it was all in the family. This circumstance tends strongly, as it seems to me, to show that all the descendants of the first wife who were present and acquiesced in the sale to the second wife did so upon the idea that she was to have only a life right. The expression 'buying it in' used by several of the witnesses, indicates the same."

7. This question is very well considered in *Griffith v. Townley*, 69 Mo. 13; S. C. 33 Am. Rep. 476. The court say: "We can not doubt that Townley acted, when making the purchase at the administrator's sale, under the confident belief that he was purchasing 'a clear title,' or title in fee; nor can we doubt that under this belief, he paid the difference between the amount of the note and the bid, surrendered that note and acknowledged satisfaction of the deed of trust. And it is equally beyond question that he was led to this course by the promises and assurances of the representative of the estate, Welton, who doubtless, as evinced by his contemporaneous declarations, supposed he was selling the land in fee simple absolute. If this was the belief of both parties, then it follows that if Townley did not by his purchase procure the fee as he intended, and as Welton intended he should, then it is a case of mutual mistake, one of so fundamental a character as appeals very strongly for equitable interposition. If on the other hand Welton was actuated by no honest purpose in the course which he pursued, and the representations which he

made, then the contract of sale was tainted with such fraud as to utterly vitiate its validity. But whether the contract was the result of mistake or fraud, in either event an unconscionable advantage has been obtained by selling a barren and worthless equity of redemption, which the purchaser did *not* intend to buy, for the full price of a title in fee, which the buyer *did* intend to buy, and which the administrator, if honest, did intend to sell him.

"These are circumstances of such peculiar character, as ought, it seems, to go far toward mitigating the rigor of the general rule. In short, this case may be said to rest, as Mr. Justice Story observes of another (1 Story Eq. Jur., § 118), upon 'mixed considerations' and not exclusively upon mere mistake or ignorance of the law. Where there was a mutual mistake of parties as to the interest of the vendor in the land sold, the Court of Appeals of Virginia held that the sale should be set aside. *Irick v. Fulton's Exrs.*, 3 Gratt. 193. And this notwithstanding the whole matter arose from a mutual misconstruction of a deed and a will, and equitable relief was asked solely on the ground that the vendor and the vendee both believed that the former only had an undivided interest in the land sold, when in truth she possessed the fee. Chief Justice Redfield, in his recent edition of Story's Equity Jurisprudence (vol. 1, § 138), remarks: 'That where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, \* \* \* equity will interfere, in its discretion, in order to prevent intolerable injustice. This we believe to be the clearly defined and well-established rule upon the subject, in courts of equity, both in England and America.' Lord Chancellor Thurlow, in *Calverley v. Williams*, 1 Ves. 210, says: 'No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed it must be conveyed.' A similar ruling was made in *Brown v. Lamphear*, 35 Vt. 252, where a vendor conveyed a lot of land on which was a spring, from which he, by means of an

aqueduct, supplied his premises with water, the aqueduct being of greater value than the price paid for the land. The vendor did not intend to part with the right to use the water from the spring, but my mistake his deed to the vendee contained no reservation of such right, the latter being in ignorance at the time of his purchase of the existence of a spring. And it was held upon bill brought, that the vendor was entitled either to a conveyance from the vendee of the right to use the aqueduct, or to a re-conveyance of the land on re-payment of the price thereof, the vendee to have his election as to which of these modes of relief the vendor should have, the court, among other things, remarking: 'The defendant takes by the conveyance a value which he did not purchase, and the case presents such elements of mistake and surprise as afford a solid ground for relief.' Mr. Justice Story says: 'Cases of surprise, mixed up with a mistake of law, stand upon a ground peculiar to themselves, and independent of the general doctrine. \* \* \* When the surprise is mutual, there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts, or have pre-supposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem upon general principles invalid—*non videntur, qui errant consentire*, is a rule of the civil law, and it is founded in common sense and common justice.' 1 Story Eq. Jur., § 134. It was decided in *Champlin v. Laytin*, 1 Edw. Ch. 467, that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, is as liable to be rescinded as one founded in a mistake of fact. In his opinion in that case, the vice-chancellor says: 'If both parties should be ignorant of a matter of law, and should enter into a contract for particular object, the result whereof would by law be different from what they mutually intended, here on account of the surprise or immediate result of the mistake of both, there can be no good reason why the court should not interfere in order to prevent the enforcement of the contract and relieve from the unexpected consequences of it. To refuse would be to permit one party to take an unconscientious advantage of the other, and to derive a benefit from the contract which neither of them intended it should produce.'

"The lord chancellor says, in *Stapylton v. Scott*, 13 Ves. 425 : 'I admit, where the contract has proceeded upon the mistake of both parties, that avoids the contract of law as well as here.' And an agreement was decreed to be given up upon the ground of surprise, neither party understanding the effect of it. *Willan v. Willan*, 16 id. 82. This exception to the rule is recognized in the case of *Hunt v. Rousmanier*, 8 Wheat. 174, Marshall, C. J., saying: 'We find no case which we think precisely in point, and are unwilling, where the effect of the instruments is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief.' So also in *Tyson v. Tyson*, 31 Md. 134, on the ground of mistake and surprise, a deed, resettling trust, which was signed without having been read, was corrected. The case of *Evans v. Llewellyn*, 1 Cox Eq. 333, is exclusively put in the decree upon the ground of surprise, 'the conveyance having been obtained and executed improvidently,' without time for proper reflection. In *King v. Doolittle*, 1 Head (Tenn.), 77, it was held that where the mistake was one both of law and fact, though the latter is the result of the former, relief will be granted, when justice and equity require it. And the court there said: 'If a contract is entered into in good faith, by which it is mutually understood, that for an adequate consideration the one party shall part with and the other acquire a valid title to property, and it turn out that at the time of the contract, by the operation of some settled principle of law, of which they were alike ignorant, the supposed title was wholly valueless, or did not exist in legal contemplation; in such case, the mistake is not a mere mistake at law; it involves in some measure a mistake of fact as well as of law, as the very idea of title comprehends as well matter of fact as of law. \* \* \*

It is enough that there was a radical defect inherent in the subject matter of the contract, of which the parties were mutually ignorant. \* \* \*

The contract therefore was not what either of the parties understood and intended it should be.' In that case the mutual mistake arose because of an omission of an essential provision of the charter of a bank, the copy furnished being unintentionally imperfect. Here the mutual mistake occurred because of the inadvertant insertion of words, of which both parties were ignorant; words in the order of sale at variance with the petition for that order, with the publication, and with the certificate of appraisement. The parties bargained for the fee, and there was

under the administration proceedings no fee for sale. The subject-matter of their contract had, in legal contemplation, no more existence than if it had been a dwelling already consumed by fire, or a message already swept away by a flood. 'Both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted therefore the very essence and condition of the obligation of their contract.' 1 Story Eq. Jur., sec. 142.

"I find it difficult to distinguish the case of *King v. Doolittle*, *supra*, from the present one in principle; for it seems quite obvious that the contracting parties in each instance were alike ignorant as to the essential features of the contract they entered into, and of the mistake committed, by reason of the unwarranted omission of words in the one case, and of their unwarranted insertion in the other. But there is another important element in this case which should not pass unnoticed. Townley is induced to have the note allowed against the estate of Welton; he is suddenly called upon to bid at the administration sale; he is afraid to bid for fear of jeopardizing the interests confided to his care; afraid not to bid for fear that his non-action will equally result in detriment to those interests. In this extremity he appeals to the administrator, he appeals to the attorney of the estate, if the title on sale will be valid, and they both unite in assurance of its validity. In cases of this sort, it is held that when the mutual mistake is attributable to the agent of the adversary seeking to take advantage of it, equity will relieve. *Green v. Morris & Essex R. Co.* 12 N. J. Eq. 165, Chancellor Williamson observing: 'The mutual mistake is to be attributed to the agent of the defendants. He prepared the deed, and he assured the complainant that it was correct. There was no want of ordinary prudence in the complainant's relying upon his judgment. He was a lawyer by profession, and it was natural and becoming that the complainant should have confided in him.' To the same effect are *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364. In conclusion, we are of opinion that there are in this case such elements of absence of consideration, of reliance on the representation of the agent of the estate, of surprise, mutual mistake and unconscionable advantage, as should in equity and good conscience take this case out of the general rule, and forbid our sanctioning the decree; for should we approve that decree, we would thereby in effect declare that the heirs of Lewis



Welton's estate should retain the unconscionable advantage which they have gained, and become enriched by the very debt of their ancestor."

8. In *March v. McNair*, 48 Hun, 117, the action was to change an absolute assignment of an insurance policy to one as collateral security alone. The facts appear in the following extracts from the opinion:

"The mistake, as such, which permits oral evidence to modify or reform a written agreement must be mutual, and in some sense have relation to facts, for as a general rule, a mere mistake of its legal effect affords no such relief. That is to say, if the written agreement is made as the parties intended, a mistake of its legal import furnishes no ground for the introduction of oral evidence to qualify its terms. (*Shotwell v. Murray*, 1 Johns. Ch. 512; *Arthur v. Arthur*, 10 Barb. 9; *Champlin v. Laytin*, 18 Wend. 407; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Wilson v. Deen*, 74 id. 531, 534.) But when in the process of reducing an agreement to writing the instrument by reason of a mistake fails to express the contract made by the parties, although it may to some extent involve mistake of law, equity may grant relief by way of reformation. In such case the mistake is not of the legal effect, but a mistake relating to the effect of the language used, which has prevented the expression in some respect, in the written instrument, of the terms of the contract as made. (2 Pom. Eq. Jur., sec. 845; *Pitcher v. Hennessey*, 48 N. Y. 415; *Lanning v. Carpenter*, id. 408; *Maher v. Hibernia Ins. Co.*, 67 id. 283; *Candedy v. Marcy*, 13 Gray, 373.) In no case will reformation be given on the ground of mistake, unless it be so done as to represent the agreement as understood when made by all the parties to it having an interest in the subject-matter involved in the determination. It is quite evident that the plaintiff was advised of the terms of the instruments of assignment when she executed them, and the evidence permits the conclusion that her mistake as to the legal effect of the assignment was produced by the information and advice given by the person who presented it to her for execution, that to render it effectual as collateral security it was necessary that its terms should be absolute. The plaintiff was not present when the negotiation which resulted in the assignment was had. The assignee, Gibson, was a banker residing at Lima, N. Y. He was also the agent of the insurance company referred to, and as such issued the two policies. With a

view to obtaining the security he went to Avon, where the other parties resided, and there met John R. and Charles H. Marsh, and made with them the agreement to assign to him the policies as security for such liabilities of Charles to him, amounting to \$500. Hosmer, a lawyer, was present, and at the request of those parties drew the papers, but before doing so he said to them, that although the assignment was intended as collateral security, it must be in form absolute, and drew it accordingly. It was then executed by Charles and John R. Marsh. And Hosmer was then requested to go to the plaintiff's house and get her to sign it. He applied to her and she declined to execute the instrument, and after returning to the other parties and informing them of her refusal, he, at the request of some one of them, repeated his application to her for its execution. He then represented to her that the assignment was only as collateral security for the amount mentioned in it, and that to render it effectual as such security it must be absolute in terms, because the insurance company would not allow or recognize it if otherwise than so made. It may have been found upon the evidence as a fact that the parties understood from the information so received that the absolute terms were essential to the transfer of the policies as security; that such feature was peculiar to life policies, and that they believed, when they made it, that the assignment as made might be effectual as security merely. In this view there was a mutual mistake of fact, which excluded from the written assignment the provision expressing the purpose for which it was made. And while there was no mistake of the legal import of the contract as actually made, a mistake of law, as well as of fact, prevented the insertion in the written instrument of the contract as so made, all of which resulted from the advice and act of the lawyer and scrivener who transacted the business for the parties other than the plaintiff.

"While in view of the rule which has generally been declared in this state, the question may not be free from doubt, we are inclined to think that such state of facts was sufficient to support equitable relief. (Story Eq. Jur., sec. 115; Pom. Eq. Jur., sec. 845; *Monne v. Ayer*, 30 J. & S. 139; *Hunt v. Rousmaniere*, 1 Pet. 1, 13; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Meyer v. Lathrop*, 73 id. 315; *Stone v. Godfrey*, 5 DeG. M. & G. 76; *Broughton v. Hutt*, 3 D. G. & J. 500; *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476.) It is difficult to lay down any rigid rule which will embrace all the cases that come within equitable

cognizance for relief of the character of that in question. While to justify it the mistake must be mutual, and the mere mistake of the legal import of a written instrument is not sufficient, there are many other considerations dependent upon deductions from evidence which may permit relief. They may arise from imposition, misrepresentation, concealment, undue influence, misplaced confidence, surprise or other inequitable conduct in the transaction. It will be observed that upon the evidence the conclusion was permitted that the sons of the plaintiff had not nor did either of them have any authority to represent the plaintiff in the making of the contract to assign the policy in question for any purpose, that the attorney Hosmer represented and acted for those three parties in what he did, and in no sense represented the plaintiff; that when he came to her with the assignment and stated to her that it was, in fact, and had the effect of collateral security, he still represented them, and that by such representation she was induced to understand that the character and legal effect of the assignment executed by her was as such security for the sum mentioned. And although it may be that the attorney was requested by one of the Marsh parties to get the signature of the plaintiff to the paper, it was done in the presence and with the knowledge of Gibson, and in aid of the common purpose of the parties there, and in the work for which the attorney was apparently engaged by them. It would therefore seem that the plaintiff may not have executed the instrument voluntarily upon her own judgment of its character, but upon the representation so made to her in that respect. In that view, although Gibson may have believed that the legal effect of the assignment was such as to effectuate the understanding that it should be as security merely, the conclusion is justified that the execution of it by the plaintiff was the result of misrepresentation for which he was in some degree chargeable, and for that reason the evidence presented a question of fact for consideration upon the merits in support of the plaintiff's claim for relief. (*Tyson v. Passmore*, 2 Penn. St. 122.) Then in view of the fact that the policies by their terms recognized the right to transfer and hold them as security, and that Gibson was the agent of the insurance company, and as such countersigned and issued them, the inference was permitted that he knew of such provision when the agreement and assignment were made, which might also lead to the conclusion that when in his presence the attorney was requested to

advise the plaintiff that the assignment was as security only, he permitted the information to be given her that such was the nature and effect of the assignment. This might be treated as a concealment from her of such provision of the policies of which the plaintiff says she had no knowledge. And that by that means she was induced to rely upon the representation and execute to him the instrument, which in equity might be characterized as fraud, and as such furnish ground for relief. (*Cook v. Nathan*, 16 Barb. 342; *Waring v. Somborn*, 82 N. Y. 604; *Welles v. Yates*, 44 id. 525; *Kilmer v. Smith*, 77 id. 226.) For the purpose of this review it is only necessary to determine whether there was any evidence which required the consideration of the case on the merits. In reaching the conclusion upon that proposition in the affirmative, we do not intend to express any opinion of the result which the trial court should reach, but only that the evidence was such as to present a question of fact for the determination of the trial court, and sufficient as furnished by the record here to support a conclusion for relief in favor of the plaintiff."

9. In *Conkling v. Davis*, 14 Abb. N. Cas. 499, it was held, at special term, that a court of equity will relieve a party from the effect of a voluntary settlement in trust for the settlor for life, with remainders over, and reserving no power of revocation, where it appears that although the settlor received proper professional advice from her attorneys who drew the deed, and who were the trustees themselves, she did not comprehend its effect, nor intend to make an irrevocable deed of her property.'

*Contrary authorities:* It has been held that equity will not relieve against a mistake in a deed of a married woman, which was inoperative for want of a statutory requirement.<sup>2</sup> Nor the omission to mention a factor's lien in a receipt for property with an agreement to deliver it.<sup>3</sup> Nor a mistaken belief as to a right to redeem from a mortgage.<sup>4</sup> Nor a mistake as to the legal effect of a note.<sup>5</sup> It was here said: "It must be shown that words were inserted that were intended to be left out, or that words were omitted which were intended to be inserted." "A mistake as to the legal effect of words inserted designedly in a written instru-

<sup>1</sup> Citing *Gurnsey v. Mudge*, 24 N. J. Eq. 243.

See Mr. Austin Abbott's note to the principal case.

*Gibbes v. N. Y. L. Ins. Co.*, 67 How. Pr. 207.

*Hall v. Hall*, L. R. 8 Ch. App. 430.

<sup>2</sup> *Gebb v. Rose*, 40 Md. 387.

*Dickinson v. Glenney*, 27 Conn. 104.

<sup>3</sup> *Potter v. Sewall*, 54 Me. 142.

<sup>4</sup> *Mellish v. Robertson*, 25 Vt. 603.

<sup>5</sup> *Heavenridge v. Mondy*, 49 Ind. 434.

ment gives no right to a reformation of such instrument." So relief was refused where the intention was to convey land to a man's wife and children, but it was conveyed by mistake to her and her heirs.<sup>1</sup> There the court said: "If a party designs to and performs an act, under a mistaken view of the law affecting the transaction, he is held to the obligation incurred." So when the intent was to execute a delivery bond to an officer, and the bond bound the obligor to pay the judgment.<sup>2</sup> "Some person must suffer, and the law wisely, though sometimes with great apparent hardship, leaves it for him to suffer who committed the mistake." "Nothing is better settled than the rule which precludes a party from proving that he misunderstood the legal effect of a written contract, which has been duly executed and delivered by him, where there is no allegation of fraud by which he was misled or deceived."<sup>3</sup> "Words must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, expressed a very different meaning from that intended. \* \* \* For if the words employed were those intended to be used, but their actual meaning was totally different from that which the parties supposed and intended them to bear, still their actual meaning would generally, if not always, be held to be their legal meaning. 2 Pars. Cont. 494, 496."

*Limitation where party accepts deed with knowledge of defect.*—But where a party accepts a deed with knowledge that a condition orally agreed upon has been omitted, this furnishes no ground for reformation.

*Illustration:* In *Shenandoah, etc., R. Co. v. Dunlop*, 86 Va. 346, the court said: "The authorities all agree that equity has jurisdiction to reform written instruments in two well-defined classes of cases only, viz.: (1) Where there has been an innocent omission or insertion of a material stipulation contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagements of parties, when reduced to writing, to be varied by parol evidence, that in no case will relief be granted except where there is a *plain mistake, clearly made out by satisfactory*

<sup>1</sup> *Goltra v. Sanasack*, 53 Ill. 457.

<sup>2</sup> *Winslow v. Driskell*, 9 Gray, 363.

<sup>3</sup> *Moorman v. Collins*, 32 Iowa, 138.

*and unquestionable proofs.* According to some of the cases there must be a certainty of the error. At all events, the party alleging the mistake, must show by evidence which leaves no doubt upon the mind of the court, not only exactly in what the mistake consists, but the correction that should be made. And where, as in the present case, such evidence is not produced, relief should be unhesitatingly denied. A rule less rigid would be fraught with infinite mischief, since it would be destructive of the certainty and safety of written contracts. Of course the danger in reforming a written contract is not as great where the alleged mistake is made out by a preliminary written instrument or agreement, as where parol evidence only is admitted. But even in such a case, said the court in *Carter v. McArtor*, 28 Gratt. 356, it must be made plainly to appear that the parties intended, in their final instrument, merely to carry into effect the arrangement set forth in the prior agreement. 'The very circumstance,' it was added, 'that the final instrument differs from the preliminary contract, affords of itself a presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract.' "

This action was brought for the reformation of a deed of a right of way. The contract for the deed was in writing, and provided that the railroad company was to provide proper wagon-ways across the tracks on the grantors' land. This was omitted from the deed, the draftsman, who was the agent of the company, informing the grantors, on their objecting to the omission, that "it was not customary to insert unusual conditions in such deeds." The deed was executed, as the court said, "with a full and clear understanding of its contents," and this being so, "there was obviously no mistake or misapprehension on the part of the complainants, and consequently no ground for the reformation of the deed. \* \* \* And as to the alleged verbal agreement, contemporaneous with the execution of the deed, that the terms of the preliminary contract should remain in full force, it is enough to say that nothing is better settled, either at law or in equity, than that in the absence of fraud, accident, or mistake, the deed must be conclusively presumed to contain the *whole* agreement between the parties. In other words, the terms of the deed cannot be varied, by parol evidence, of what occurred

between the parties previously thereto, or contemporaneously therewith."

*Limitation where money is paid under mistake of fact.*—But it is generally held that money paid voluntarily under a mutual mistake of law, but with full knowledge of the facts, cannot be recovered.

*Illustrations:* In *Burkhauser v. Schmitt*, 45 Wis. 316; S. C. 30 Am. Rep. 740, the plaintiff, proposing to buy of the defendant his interest in certain lands, was informed of all the facts affecting the title. An attorney acting for both parties, upon consideration of those facts, advised the parties that the defendant had a certain interest in the lands. The plaintiff acting upon that advice purchased the supposed interest. This advice being incorrect, *held*, that the mistake was one of law only, and the plaintiff could not recover back the purchase-money. This was decided without much expressed consideration, on the authority of *Hurd v. Hall*, 12 Wis. 113, but that decision was put on the grounds of ignorance of fact and failure of consideration, and the court said *obiter*, "It is only against mistakes of fact that courts will grant relief."

Adams says on this point (Equity, 189): "The rule at law is clear, that money paid by a man with full knowledge of all the circumstances, or with the means of such knowledge in his hands, cannot be recovered back again on account of such payment having been made in ignorance of the law." (Citing *Bilbie v. Lumley*, 2 East. 469). The principle ought to be the same in equity. And again, he says, that subject to the exception which may exist in the case of one's having "given up a portion of his undisputable property under the name of a compromise," it seems now to be clearly established that in equity as well as at law, a mere mistake of law, where there is no fraud or trust, and no mistake of fact, is immaterial.

Mr. Pomeroy says: "It is settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, but with full knowledge or with means of obtaining knowledge of all the circumstances, cannot be recovered back."<sup>1</sup> But he observes in a note that "If the doctrine formulated in § 849 be correct, then it seems that this particular rule forbidding the recov-

<sup>1</sup> 2 Pom. Eq. Jur. § 851.

ery back of money paid under a mistake of law, is based upon an erroneous conception of the principle which should govern such cases; and the opinions of those jurists which uphold the right of recovery, quoted *ante*, in the note under § 841, appear to be correct in principle. This rule itself is an illustration of the disinclination of equity courts to depart from a doctrine settled at law, where the rights and the remedies are the same in both jurisdictions." The doctrine thus laid down by Adams and Pomeroy is sustained by a long list of American authorities (2 Pom. Eq. Jur. § 842, n.) from some seventeen States.

Pollock says (Cont. 397): "Money paid under a mistake of law cannot in any case be recovered; nor does anything like the qualification laid down by Lord Westbury in *Cooper v. Phibbs* 16 L. T. Rep. (N. S.) 683, appear to be admitted. Ignorance of particular rights, however excusable, is on the same footing as ignorance of the general laws." Where a widow, under mistake as to her rights in her husband's estate, renounced the provision made for her by his will, and elected to take her dower, but after the statutory period for making her election, applied to be allowed to recall her election and take under the will, the application was allowed.<sup>1</sup> "There is quite sufficient authority to show that a renunciation of rights under a mistake as to particular applications of law is not conclusive, and some authority to show that it is the same even if the mistake is of a general rule of law."<sup>2</sup>

<sup>1</sup> Evans' Appeal, 51 Conn. 435.

Macknet v. Macknet, 29 N. J. Eq. 54.

<sup>2</sup> Pollock Cont. 395.



## CHAPTER X.

## MODIFICATION, DISCHARGE, SUBSTITUTION, WAIVER.

SEC. 45. General rule.

46. Exception as to sealed instruments at law.

47. Discharge of sealed contract.

48. Waiver as to insurance policies.

### Sec. 45. General rule.

Evidence of a parol agreement is admissible to extend the time or change the place or manner of performance of a prior unsealed written contract, and before breach thereof and for a new consideration to waive, vary, discharge or annul it, or any provision of it.<sup>1</sup>

*Illustrations:* 1. Lord Denman, in *Goss v. Lord Nugent*, 5 B. and Adol. 63, lays down the rule: "After the agreement is reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve or annul the former agreement, or

<sup>1</sup> *Keating v. Price*, 1 Johns. Cas. 22; S. C. 1 Am. Dec. 92.

*Solomons v. Jones*, 3 Brevard, 54; S. C. 5 Am. Dec. 538.

*LeFevre v. LeFevre*, 4 S. & R. 241; S. C. 8 Am. Dec. 696.

*Spann v. Baltzell*, 1 Fla. 301; S. C. 46 Am. Dec. 346.

*Bryan v. Hunt*, 4 Sneed, 543; S. C. 70 Am. Dec. 262.

*Deshazo v. Lewis*, 5 Stew. & Port. 91; S. C. 24 Am. Dec. 769.

*Cummings v. Arnold*, 3 Metc. 486; S. C. 37 Am. Dec. 155.

*Emerson v. Slater*, 22 How. 42.

*Piatt v. U. S.* 22 Wall. 507.

*Vicary v. Moore*, 2 Watts, 451; S. C. 27 Am. Dec. 323.

*Baker v. Whitesides*, Breese, 174; S. C. 12 Am. Dec. 168.

*Morgan v. Butterfield*, 3 Mich. 623.

*Perrine v. Cheeseman*, 6 Halst. 174; S. C. 19 Am. Dec. 388.

*Conrad v. Fisher*, 37 Mo. App. 352.

*Phelps v. Seely*, 22 Gratt. 573.

*Akers v. Hite*, 94 Pa. St. 394; S. C. 39 Am. Rep. 792.

*Palmer v. Fogg*, 35 Me. 368; S. C. 58 Am. Dec. 708.

*Grange v. Palmer*, 56 Hun, 481.

*Woolner v. Hill*, 93 N. Y. 576.

*Viele v. Germania Ins. Co.* 26 Iowa, 9; S. C. 96 Am. Dec. 83.

*Juilliard v. Chaffee*, 92 N. Y. 529.

*Courtenay v. Fuller*, 65 Me. 156.

*Allen v. Sowerby*, 37 Md. 410.

*Malone v. Dougherty*, 79 Pa. St. 46.

*McCauley v. Keller*, 130 Pa. St. 53; S. C. 17 Am. St. Rep. 758.

*Morrissey v. Schindler*, 18 Neb. 672.

in any manner to add to, subtract from, or vary or qualify the terms of it, by a new contract not in writing, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement." In *Bryan v. Hunt*, 4 Sneed, 543; S. C. 70 Am. Dec. 262, it was said: "To admit evidence of a subsequent parol agreement, for the purpose of showing an abandonment, discharge or alteration of the terms of a previous written agreement not under seal, would not be to affect or dissolve the agreement by matter of an inferior nature."

2 In *Holloway v. Frick*, — Pa. St. —, 24 Atl. Rep. 201, the court observed: "It is claimed that as no fraud or mistake is alleged, it was not competent to vary this contract by parol evidence. The principle, however, has no proper application to the present case. It is always competent for the parties to a written contract to show that it was subsequently abandoned in whole or in part, modified, changed, or a new one substituted; and this may be shown by parol, by showing either an express agreement, or actions necessarily involving the alteration. In the present case the plaintiff, the defendant, and one Howe entered into partnership in April, 1887, and by the written terms of agreement plaintiff was to furnish one-fourth of the capital, each of the others three-eighths, and the profits were to be divided in the same ratio. Plaintiff claimed that this agreement was never carried out, and that by the terms of the partnership actually entered into, the interest of each partner was one-third. It is the admission of evidence to sustain this claim that is argued to be the error. But such evidence was clearly competent. It was not offered to contradict or vary the contract shown in the writing. On the contrary, plaintiff's contention was that the writing represented correctly the contract as it was at the time, but that it was subsequently altered, and he gave as the reason for the alteration the original expectation that two other parties, Barr and Coxe, were each to have an eighth interest, to be deducted from the interests of defendant and Howe, so that each of the three nominal partners should have an equal one-fourth, and the two silent partners the other fourth between them. The two others however did not come into the enterprise, and plaintiff's contention was that the written agreement was then modified to the extent that the shares of the three partners were still to be equal, but thirds instead of quarters. This was not contradicting the

writing, but showing a subsequent modification of the contract contained in it. Such evidence was competent."

3. An invalid contract may be made valid by subsequent parol agreement. Thus a usurious contract may be changed by subsequent agreement into a valid contract.<sup>1</sup>

4. Upon this principle it has been held that an open policy of insurance may be modified by parol before loss, even when the policy provides in substance that it may only be done by indorsement on the policy.<sup>2</sup>

5. The time of performance may be extended by parol.<sup>3</sup>

6. The amount of rent fixed by an unsealed written lease may be shown to have been reduced by a subsequent executed oral arrangement.<sup>4</sup> And so of a premature cancellation of the term.<sup>5</sup>

*As to necessity for new consideration:* In *Brown v. Everhard*, 52 Wis. 205, it was held that no new consideration was necessary; and in *Thomas v. Barnes*, — Mass. —, 31 N. E. Rep. 683, the court said: "The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract."

*Limitations:* But evidence of a parol contemporaneous privilege to revoke the written agreement is inadmissible.<sup>6</sup>

*Illustrations:* Thus it has been held that parol evidence was not admissible to prove that an absolute written assignment of a land contract was afterward rescinded or agreed to be held as security for debts due from the assignor to the assignee.<sup>7</sup> Or to prove that a contract silent as to time of performance was to be performed in a time which the law would not deem reasonable.<sup>8</sup>

## Sec. 46. Exception as to sealed instruments.

This rule does not apply to sealed instruments, at law, but it is otherwise in equity.

<sup>1</sup> *DeWolf v. Johnson*, 10 Wheat. 367.

<sup>2</sup> *Day v. Mechanics' etc. Ins. Co.*, 88 Mo. 325; S. C. 57 Am. Rep. 416.  
*Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204.

*Canal Co. v. Ray*, 101 U. S. 522.

<sup>3</sup> *Keating v. Price*, 1 Johns. Cas. 22; S. C. 1 Am. Dec. 92.

*Baker v. Whitesides*, Breese, 174; S. C. 12 Am. Dec. 168.

<sup>4</sup> *Nicoll v. Burke*, 78 N. Y. 585.

<sup>5</sup> *Hope v. Balen*, 58 N. Y. 380.

<sup>6</sup> *Wemple v. Knopf*, 15 Minn. 440; S. C. 2 Am. Rep. 147.

<sup>7</sup> *Richardson v. Johnson*, 41 Wis. 100; 22 Am. Rep. 712.

<sup>8</sup> *Liljengren Furniture & L. Co. v. Mead*, 42 Minn. 420.

*Illustrations:* 1. Thus it does not apply, at law, to leases;<sup>1</sup> nor to agreements for sale of land;<sup>2</sup> nor to a covenant in a writing.<sup>3</sup>

2. Dwight, C., says in *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 207: "As a result of all the cases and of sound principle, I think it clear that a condition required by a written instrument, not under seal, that an act be performed or evidenced by a statement in writing, may be waived by parol; and that from necessity the acts going to establish waiver may be shown by parol evidence; and that while on technical grounds this doctrine has not been extended, in some cases in courts of law, to such clauses in sealed instruments where a mere parol license has been given, yet that even in such a case a parol license may be upheld in equity on the theory of an equitable estoppel." The point of the decision was that a condition in a fire policy that it should be avoided by other subsequent insurance, without consent of the company written on the policy, should avoid the policy, may be waived by oral consent. Dwight, C., further said that the ordinary rule excluding parol evidence "has no application where the validity or existence of the contract itself is in question. \* \* \* The whole contest is upon the validity or invalidity of the contract, and the sole point is, can a condition precedent be waived by the words or acts of the parties. That is simply an inquiry whether a party can, by his own acts, be precluded from setting up a condition inconsistent with his acts, to the injury of an opposite party, whom he has thus misled. \* \* \* The defendant must then contend that if parties, when they enter into a contract not required by law to be in writing, provide for a particular mode of proving for the performance of an act, they cannot, by subsequent acts or arrangements, vary from it. The contract thus becomes an iron bond, binding both parties even against their joint will. Such a conclusion is little less than absurd."

*Rule in equity:* 1. But in *Canal Co. v. Ray*, 101 U. S. 522, it is held that in equity the terms of a sealed contract may be varied by a subsequent parol agreement. This the court held "notwithstanding what is said in some of the old cases," and declaring that "the rule in equity is undoubted," citing *Dearborn v. Cross*, 7 Cow. 48; *LeFevre v. LeFevre*, 4 S. & R. 241; *Fleming v.*

<sup>1</sup> *Roe v. Harrison*, 2 T. R. 425.

*Macher v. Foundling Hospital*, 1 V. & B. 188.

*Coe v. Hobby*, 72 N. Y. 141.

<sup>2</sup> *Heth v. Wooldridge*, 6 Rand. 605.

<sup>3</sup> *Littler v. Holland*, 3 T. R. 590.

Gilbert, 3 Johns. 528. In the first case cited, an action on a note a bond collateral was held discharged by a subsequent executed parol agreement. The court said: "It is not necessary to decide that a parol agreement to rescind a sealed contract is binding as an executory agreement." In the second, an action of trespass, parol evidence was admitted to show an executed oral agreement to change the route of a water-course granted by deed. Here the court said: "A party may be permitted to prove by parol evidence that after signing a written agreement the parties made a verbal agreement varying the former; provided their variations have been acted upon, and the original agreement can no longer be acted upon without a fraud on one party." In the third case cited it was held that the time for performance of a bond may be enlarged by parol, and evidence of an oral agreement to waive further performance was admissible. So in *Lattimore v. Harsen*, 14 Johns. 330, a covenant was held well released by parol, and in *Burt v. Saxton*, 1 Hun, 553, it was held competent to show an oral extension of the time of payment of a sealed instrument.

2. In *San Remo Hotel Co. v. Brennan*, 64 Hun, 607, an action for injunction to restrain the defendant from dispossessing the plaintiff from a hotel occupied under a sealed lease, it appeared that the rent specified in the lease was \$6,000 a month. Parol evidence was admitted to show that occupation was to be given October 1st, 1891, but the premises being then unfinished, Brennan agreed by parol to reduce the rent to \$3,500 a month up to October 1st, 1892. The court observed: "It is insisted by appellant that the contract set forth in the complaint, being an oral one, intended to reduce the rent reserved in, and in that respect to modify a lease for ten years, which by statute must be in writing, and to which the parties had affixed their seals, is void at law and may be repudiated by either party, so far as the oral modification remains unexecuted. In support of this proposition we are referred to the cases of *Coe v. Hobby*, 72 N. Y. 141; *Smith v. Kerr*, 108 id. 31; *McKenzie v. Harrison*, 120 id. 260 and *McCreery v. Day*, 119 id. 1. In *Coe v. Hobby*, it was held that a contract or covenant under seal cannot be modified before breach by a parol executory contract. In *Smith v. Kerr* it was held that a simple executory agreement, without consideration, to alter the terms of an existing unexpired lease in which no breach had occurred, was void. In *McKenzie v. Harrison* (p. 263) the court said: 'We shall not question the rule that a contract

or covenant under seal cannot be modified by a parol unexecuted contract.' These cases however in no way destroy the force of the rule, sustained by many cases, that 'after the breach of a sealed agreement, it may be modified in any respect, or wholly rescinded, by an executed parol agreement founded upon a sufficient consideration.' *Dodge v. Crandall*, 30 N. Y. 294, 307. A parol modification of a sealed instrument to be enforceable must be an executed, as distinguished from an executory, contract, and it must be a valid binding agreement, founded upon a sufficient consideration. Therefore if the facts here had shown that the landlord had performed all the covenants on his part, and that thereafter the tenant, having entered into possession, had made an arrangement with the landlord for an abatement of the rent secured by a sealed instrument with respect to any portion of the term, notwithstanding such an arrangement an action would be maintainable for the amount stipulated in the sealed lease. This was the question which the Court of Appeals disposed of in *McKenzie v. Harrison*, 120 N. Y. 260, where the landlord, after having reduced the rent and accepted payment of installments thereof in full 'until times are better,' sued for the balance of the installment under the lease for which they had receipted in full, and a verdict was directed in their favor. The court therein said: 'We shall not question the rule that a contract or covenant under seal cannot be modified by a parol unexecuted contract. \* \* \* Neither shall we question the views of the court below, to the effect that the alleged oral agreement \* \* \* was void and inoperative in so far as it remained unexecuted. The lessors had the right to repudiate it at any time and demand the full amount of rent provided for in the lease; but in so far as the oral agreement had become executed, as to the payments which had fallen due and had been paid and receipted in full as per the oral agreement, we think the rule invoked has no application.' The question here presented is different from that decided in *McKenzie v. Harrison*, *supra*, in that if the facts stated by the plaintiff can be proven upon a trial—that having a valid claim for damages by reason of the breach of the covenant for occupation and enjoyment on and after October first, this claim was waived in consideration of the parol agreement to take a less rent for the first year—such an agreement executed on the part of the plaintiff, and partly performed by the defendant by the allowances made for the months of the

year that have passed, we do not think could have been repudiated. And this, we think, will become apparent if for the purpose of disposing of the question we assume the plaintiff's facts to be sustained by competent proof. Thus assumed, if the premises were not ready for occupancy on the 1st of October, 1891, and the tenant had gone into partial possession, it could have successfully defended an action for the rent or have brought a suit in equity for an apportionment. *Brown v. Wakeman*, 42 N. Y. St. Rep. 677; *Kelly v. Miles*, 48 Hun, 6. As said by Mr. Justice Daniels, writing the opinion in the case of *Kelly v. Miles*, *supra*: 'The occupancy assured to him' (the tenant) 'by the lease was the consideration for his covenant to pay, and to the extent that he was deprived of the ability to occupy by the act of the owner under the authority and assent of the defendants, the plaintiff was entitled to an abatement and apportionment of the rent.' These cases are authority for the position that one who enters into possession of part of premises, all of which has been hired by him, does not thereby waive his right to equitably set off against the rent reserved in the lease the value of the proportion of the premises the possession of which may have been withheld by reason of the failure of the landlord to fulfill the agreement on his part to have them ready for occupancy. They are also authority for the maintenance of an action such as this, wherein it is sought to stay dispossession proceedings against the tenant, where the facts relied upon by the tenant are not available in such proceedings as a defense. We are therefore of opinion that a parol agreement, such as is asserted by plaintiff and made the basis of his complaint, is not purely executory and one that, therefore, may be repudiated by either party. If, upon a trial, it can be shown that the premises were unfinished and unfit for occupancy on October first, and that thereby the plaintiff had a valid claim for damages as against the defendant, which, in consideration of waiving, was made the basis of an agreement by the defendant to take a less sum for the year ending October 1, 1892, then is presented, within the authorities, a case where a parol agreement, based upon a sufficient consideration, after a breach, has been established, which can be availed of to modify a lease under seal, and which cannot be repudiated if shown to have been executed by one of the parties and partially executed by the other. Even though his view should be in seeming conflict with some of the authorities, we think that the questions presented

were serious enough to require their disposition in a more deliberate manner than by affidavits upon a motion, and that it was a proper case to continue the injunction until a trial could be had; and this for the reason, well expressed by the learned judge, that 'if the injunction is continued until the trial, the defendant can be fully protected from all loss by a proper undertaking; whereas, if the injunction is dissolved, and the lease is terminated by dispossession proceedings, the plaintiff will suffer irreparable injury.'"

#### **Sec. 47. Discharge of sealed contract.**

But a contract under seal may be shown to have been discharged by the performance of a new parol agreement.

*Illustrations:* 1. *McCreery v. Day*, 119 N. Y. 1; S. C. 16 Am. St. Rep. 793. Thus oral agreement, on a new consideration, to extend the time of payment of a mortgage on land is valid.<sup>1</sup>

2. By an antenuptial agreement under seal a wife agreed to take 80 acres of land after her husband's death in lieu of dower. Afterwards the husband conveyed said land by deed, in which his wife joined, and on the same day he conveyed another 80-acre tract to a trustee in trust to convey same to his wife if she survived him. It was held, that parol evidence was admissible to show that this conveyance in trust was made as a substitution for the antenuptial agreement.<sup>2</sup>

#### **Sec. 48. Waiver as to insurance policies.**

Parol evidence is competent to show a waiver of a breach of a condition or warranty in a policy of insurance, either on the ground of knowledge of the facts in the agent at the time of issuing the policy, or of such subsequent conduct on the part of the insurer or its agents as subject the insured to expense and lead him to believe that the breach is waived.

Insurance contracts form an important exception to the general rule that waiver may not be shown after breach, and it is put on the grounds of estoppel and public policy. This modification is sustained by the large preponderance of recent authorities, although many of the earlier cases were different (such as

<sup>1</sup> *Kane v. Cortesy*, 100 N. Y. 132.

<sup>2</sup> *Worrell v. Forsyth* (Ill. Sup.), 30 N. E. 673.



Barrett v. Union M. Ins. Co., 7 Cush. 175; Jenkins v. Quincy M. F. Ins. Co., 7 Gray, 370; Lee v. Howard F. Ins. Co., 3 Gray, 589; Ripley v. Ætna Ins. Co., 30 N. Y. 136, S. C. 86 Am. Dec. 362; Jennings v. Chenango Co. M. Ins. Co., 2 Denio, 75; Kennedy v. St. Lawrence Co. M. Ins. Co., 10 Barb. 285; ) some very respectable recent adjudications are in conflict with it, and the cases cited and relied on, especially in New York, are decided by a divided court. It has always been conceded that a warranty in an insurance policy, inserted by the agent of the company by mistake or fraud, might be corrected by resort to a court of equity. Collett v. Morrison, 9 Hare, 162; In re Universal Non-Tariff Fire Ins. Co., L. R. 19 Eq. 485; Malleable Iron Works v. Phoenix Ins. Co., 25 Conn. 465; Woodbury Savings Bank v. Charter Oak Ins. Co., 31 id. 517; Maher v. Hibernia Ins. Co., 67 N. Y. 283. It has always been conceded that as to a mere representation, not amounting to a warranty, no resort to a court of equity is necessary, but parol evidence to show the mistake or fraud might be adduced in an action on the contract itself. State Mutual Ins. Co. v. Arthur, 30 Penn. St. 315. But in regard to warranties, it was early held that parol evidence could not be introduced to contradict the contract in an action founded on the contract. Later it has been held that such evidence is admissible to work an estoppel against the insurer, and this seems now to be the prevalent doctrine.

Mr. Wood states the rule as follows: "It is well settled by the weight of authority, that where a policy is issued containing conditions inconsistent with the facts, and the agent knew the facts when the policy was issued, the conditions are waived so far as they conflict with the facts known to the agent; and this is peculiarly the case where the agent fills up the application erroneously, when the facts were correctly stated to him by the assured." Wood Fire Ins., § 88.

*Illustrations:* 1. The most authoritative decision to maintain the principal case is Insurance Company v. Wilkinson, 13 Wall, 222. There the local agent had inserted in the application a warranty of the age of the mother at the time of her death, which was untrue, but which the agent obtained from a third person, and inserted without the assent of the insured; this was held to be the act of the company, and not of the insured. The court says: "It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or such

assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agents represent. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance, as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that as to all other acts of the agent he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a defense, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact busi-

ness for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal."

2. In *Plumb v. Cattaraugus Co. M. Ins. Co.*, 18 N. Y. 392, the agent prepared the policy and made the survey and measurements, procuring the applicant's signature without any examination on the part of the latter as to their correctness, by representing that he had full authority to make such surveys and measurements on behalf of the insurer; and it was held that assuming the agent's representations to be true, the insurer was estopped from showing a breach of warranty by proof of errors in such survey and application. The court say: "When the party, through whose acts and representations the other party was induced to enter into the contract, claims the right to show that the facts were different from what he had represented them to be, for the purpose of showing a breach of the warranty, and thus avoiding what would otherwise be a binding contract, and escaping its obligations, I cannot discover why the doctrine of estoppel may not be applied to him, and he be precluded from denying what he once asserted." Three judges dissented.

3. The rule is also supported by *Rowley v. Empire Insurance Co.*, 36 N. Y. 550, in which the *Plumb* case is treated as having changed the rule in New York, as laid down in *Brown v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 385; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Vandervoort v. Columbian Ins. Co.*, 2 Cai. 155; *Cheriot v. Barker*, 2 Johns. 346, and elsewhere, as in *Higginson v. Dall*, 13 Mass. 96; *Weston v. Emes*, 1 Taunt. 115; *Atherton v. Brown*, 14 Mass. 152; *Parks v. General Assur. Co.*, 5 Pick. 34; *Flinn v. Tobin*, 1 Mood. & Malk. 367. The courts however are clearly in error in citing the *Brown* case to that doctrine, for, although such was the drift of the opinion by Strong, J., yet it was not concurred in, and the judgment was distinctly put on another ground; see p. 391. Any other view would make the court guilty of delivering decisions precisely in conflict with each other, the one following the other in order in the same volume. The *Rowley* case was unanimous, except that one judge dissented and one did not vote.

4. The same doctrine was laid down in *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434, three judges, however, dissenting, and the court distinguishing *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114; *Rohrbach v. Germania Ins. Co.*, 62 id. 47, and *Ripley v. Ætna Ins. Co.*, 30 id., 136, and citing *Bodine v. Exchange Ins.*

Co., 51 id. 117; 10 Am. Rep. 566. This case reviews all the New York authorities, and is decided by a majority of one only, leaving the impression that the subject is very uneasy in that State.

5. The same doctrine was adopted in *Combs v. Hannibal Savings and Ins. Co.*, 43 Mo. 148, which is based on the *Plumb* and *Rowley* cases. To the same effect is *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; and *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 624; both founded on *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Ayres v. Home Ins. Co.*, 21 Iowa, 185; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; in which Judge Cooley gives a learned opinion, although he erroneously cites the *Brown* case as an authority to the contrary; *Kelly v. Troy Ins. Co.*, 3 Wis. 254; *May v. Buckeye Mutual Ins. Co.*, 25 id. 291, 306, 3 Am. Rep. 76; *Ins. Co. v. Lyons*, 38 Tex. 271; *American, etc., Ins. Co. v. McLanathan*, 11 Kans. 549; *Campbell v. Merchants', etc., Ins. Co.*, 37 N. H. 35. In *Ætna, etc., Ins. Co. v. Olmstead*, 21 Mich. 246, the same doctrine was held. Cooley, J., here observed: "The general rule undoubtedly is, that in the absence of fraud, accident or mistake, a party must be conclusively presumed to understand the force of his contracts, and to be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was by the very terms of the contract to render it void. Still less can this be allowed, when the representation itself is so ambiguously worded as to be well calculated to conceal its real meaning, and to deceive the party signing it."

*Contrary authority:* 1. The leading recent case holding a different doctrine from the principal case, is *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568, where it was decided by the court of errors and appeals, that in an action upon a policy of fire insurance, evidence of what passed between the assured and the agent of the company at the time of effecting the insurance, was not admissible as against the defense of forfeiture of breach of conditions. The application was filled out by the agent, who, knowing that the premises were occupied as a tavern and billiard-room (both extra-hazardous), described them as "occupied as a dwelling and boarding-house." The court held that evidence of this fact could not be received to show that the parties intended to insure the premises as they

in fact were. The court admitted that if the misrepresentation had been of a fact collateral to the contract, proof of the agent's knowledge of the truth would have been an answer, but insisted that as to a warranty a different rule prevails, and the contract fails if the warranty is not true without regard to the knowledge of the company. The court further conceded that if the proposal for insurance was prepared by the agent of the company, and he misdescribed the premises, with full knowledge of their actual condition, and there was no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity, and made to conform to the condition of the premises as they were known to the agent. But it was held that in an action at law on the policy the rights of the parties must be determined by the contract without regard to the knowledge of the insurers or its agents. The court observe: "It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere invasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not in reality the contract as made; a defendant cannot be estopped from making the defense that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his rights under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show from such sources that the contract as put in writing does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony when offered to vary or affect the terms of the written instrument." There was a dissent on the part of three of the twelve judges.

2. In *State M. F. Ins. Co. v. Arthur*, 30 Penn. St. 331, the same doctrine was held in 1858. The court said: "Knowledge

by the underwriters of a breach of warranty, at the time it was made, does not relieve the assured from the consequences of the breach, or convert the engagement into a different warranty. It may relieve against a false or imperfect representation, but not against a warranty. The purpose in requiring a warranty is to dispense with inquiry, and cast entirely upon the assured the obligation that the facts shall be as represented. Compliance with his warranty is a condition precedent to any recovery upon the contract. It is therefore that the materiality of the thing warranted to the risk is of no consequence. The assured, by his warranty, engages that whatever may be the condition of things when he makes his application, the facts shall be as warranted when the policy attaches. The building may be occupied as a powder magazine to-day, but when the risk commences it must be what he has warranted. Knowledge by the underwriter, or by him and the assured, is no basis for reforming the policy, though it is conceded that equity will reform it in the case of mutual mistake of facts." "It is not true that the rule which prevails in sales of personal property, namely, that the warranty does not embrace defects known to the purchaser, is also extended to warranties contained in policies of insurance."

3. To the same effect are *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Barrett v. Mut. Ins. Co.*, 7 Cush. 175; *Lowell v. Middlesex Ins. Co.*, 8 id. 127; *Jenkins v. Quincy Mut. Ins. Co.*, 7 Gray, 370; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235.

*Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331, and *Patten v. Ins. Co.*, 40 N. H. 375, sometimes cited on one side and sometimes on the other of this question, *decide* only that the doctrine of the rule is applicable in cases of representation not amounting to warranty.

*Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451, sometimes cited as authority for the contrary doctrine to that of the rule, cannot justly be so deemed, for in that case the policy contained a provision that the agent should be deemed the agent of the insured as to all representations and warranties, and the court were unanimous, while the same court, two years later, in the *Van Schoick* case, were divided four to three. In *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114, the applicant wrote for one kind of policy and received an entirely different one, and it was held that parol evidence could not be received to vary it.

The case of *Insurance Co. v. Mowry*, 96 U. S. 544, is not at all in point, for there the representation of the agent was not at the time of the writing of the policy, but previous, and was merely to the effect that the insured should have notice when his premiums should come due before being required to pay them; and the court held that the previous negotiations were merged in the written contract. These cases are cited and relied on in *Franklin Fire Ins. Co. v. Martin*, *supra*, and that decision loses much of its authority, in our judgment, from the exposure of the true character of those decisions. The doctrine of the *Rohrbach* case had in effect been previously announced in *Chase v. Hamilton Ins. Co.*, 20 N. Y. 53, where, although the agent knew the facts and filled up the application, yet the application stipulated that the insurer should not be bound by acts done by or statements communicated to an agent, unless contained in the application.

The rule is thoroughly sustained by the recent cases given in the foot-note.<sup>1</sup>

<sup>1</sup> As to waiver of condition against over-insurance :

*Elliott v. Lycoming Co. M. Ins. Co.* 66 Pa. St. 22; S. C. 5 Am. Rep. 323.

As to condition in respect to change or increase of risk.

*Com. v. Hide & Leather Ins. Co.* 112 Mass. 136; S. C. 17 Am. Rep. 72.

*Oshkosh Gaslight Co. v. Germania F. Ins. Co.* 71 Wis. 454; S. C. 5 Am. St. Rep. 233.

As to condition in respect to disclosure of incumbrances :

*N. A. F. Ins. Co. v. Throop*, 22 Mich. 146; S. C. 7 Am. Rep. 638.

*Wilson v. Minn. F. M. F. Ins. Assn.* 36 Minn. 112; S. C. 1 Am. St. Rep. 659.

*Copeland v. Dwelling-house Ins. Co.* 77 Mich. 554; S. C. 18 Am. St. Rep. 414.

*McFarland v. Kittanning Ins. Co.* 134 Pa. St. 590; S. C. 19 Am. St. Rep. 723.

As to waiver of condition for payment of premium :

*Sims v. State Ins. Co.* 47 Mo. 54; S. C. 4 Am. Rep. 311.

*Bodine v. Ex. F. Ins. Co.* 51 N. Y. 117; S. C. 10 Am. Rep. 566.

*Young v. Hartford Fire Ins. Co.* 45 Iowa, 377; S. C. 24 Am. Rep. 784.

*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; S. C. 15 Am. Rep. 612.

*Joliffe v. Madison M. Ins. Co.* 39 Wis. 111; S. C. 20 Am. Rep. 35.

*Southern L. Ins. Co. v. Booker*, 9 Heisk. 606; S. C. 24 Am. Rep. 344.

*Howell v. Knickerbocker L. Ins. Co.* 44 N. Y. 276; S. C. 4 Am. Rep. 675.

*Carson v. Jersey City F. Ins. Co.* 14 Vroom, 300; S. C. 39 Am. Rep. 584.

*Woody v. Old Dominion Ins. Co.* 31 Gratt. 362; S. C. 31 Am. Rep. 732.

*Piedmont & Arlington L. Ins. Co. v. Young*, 58 Ala. 476; S. C. 29 Am. Rep. 770.

*Dilleber v. Knickerbocker L. Ins. Co.* 76 N. Y. 567.

*Leslie v. Knickerbocker L. Ins. Co.* 63 N. Y. 27.

*Prentice v. Knickerbocker L. Ins. Co.* 77 N. Y. 483; S. C. 33 Am. Rep. 651.

*Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247; S. C. 35 Am. Rep. 122.

*Insurance Co. v. Eggleston*, 96 U. S. 572.

*Willcuts v. N. W. L. Ins. Co.* 81 Ind. 300.

*Custom to accept premiums:* In some cases proof has been admitted of a general custom among insurance companies to

- Williams v. Hartford Ins. Co. 54 Cal. 442.  
 Meyer v. Knickerbocker L. Ins. Co. 73 N. Y. 516; S. C. 29 Am. Rep. 200.  
 Mayer v. M. L. Ins. Co. 38 Iowa, 304; S. C. 18 Am. Rep. 34.  
 Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459; S. C. 31 Am. Rep. 555.  
 Walsh v. Ætna L. Ins. Co. 30 Iowa, 133; S. C. 6 Am. Rep. 664.  
 Appleton v. Phoenix M. L. Ins. Co. 59 N. H. 541; S. C. 47 Am. Rep. 220.  
 Lebanon M. Ins. Co. v. Hoover, 113 Pa. St. 591; S. C. 57 Am. Rep. 511.  
 Dayton Ins. Co. v. Kelly, 24 Ohio St. 345; S. C. 15 Am. Rep. 612.  
 Susquehanna M. F. Ins. Co. v. Elkins, 124 Pa. St. 484; S. C. 10 Am. St. Rep. 608.  
 Farnum v. Phoenix Ins. Co. 83 Cal. 246; S. C. 17 Am. St. Rep. 233.
- As to waiver of condition against sale or change of title, or possession or occupancy:  
 Pratt v. N. Y. Cent. Ins. Co. 55 N. Y. 505; S. C. 14 Am. Rep. 304.  
 Whited v. Germania F. Ins. Co. 76 N. Y. 415; S. C. 32 Am. Rep. 330.  
 Shearman v. Niagara F. Ins. Co. 46 N. Y. 526; S. C. 7 Am. Rep. 380.  
 Miner v. Phoenix Co. 27 Wis. 693; S. C. 9 Am. Rep. 479.  
 Maryland F. Ins. Co. v. Gusdorf, 43 Md. 506.
- As to waiver of condition against other insurance:  
 Couch v. City F. Ins. Co. 38 Conn. 181; S. C. 9 Am. Rep. 375.  
 Webster v. Phoenix Ins. Co. 36 Wis. 67; S. C. 17 Am. Rep. 479.  
 Security Ins. Co. v. Fay, 22 Mich. 467; S. C. 7 Am. Rep. 670.  
 Allemania F. Ins. Co. v. Hurd, 37 Mich. 11; S. C. 26 Am. Rep. 491.  
 Hayward v. Nat. Ins. Co. 52 Mo. 181; S. C. 14 Am. Rep. 400.  
 Levy v. Peabody Ins. Co. 10 W. Va. 560; S. C. 27 Am. Rep. 598.
- Pechner v. Phoenix Ins. Co. 65 N. Y. 195.  
 Kitchen v. Hartford F. Ins. Co. 57 Mich. 135; S. C. 58 Am. Rep. 344.  
 Am. Cent. Ins. Co. v. McCrea, 8 Lea, 513; S. C. 41 Am. Rep. 647.  
 Dayton Ins. Co. v. Kelly, 24 Ohio St. 345; S. C. 15 Am. Rep. 612.  
 Carrugi v. Atlantic F. Ins. Co. 40 Ga. 135; S. C. 2 Am. Rep. 567.  
 Queen Ins. Co. v. Young, 86 Ala. 424; S. C. 11 Am. St. Rep. 51.  
 Cleaver v. Traders' Ins. Co. 71 Mich. 414; S. C. 15 Am. Rep. 275.  
 Grubbs v. N. C. Home Ins. Co. 108 N. C. 472; S. C. 23 Am. St. Rep. 62.
- Contra:* Havens v. Home Ins. Co. 111 Ind. 90; S. C. 60 Am. Rep. 689.
- As to waiver of condition in respect to notice and proofs of loss or death:  
 Carson v. Jersey City F. Ins. Co. 14 Vroom, 300; S. C. 39 Am. Rep. 584.  
 Rokes v. Amazon Ins. Co. 51 Md. 512; S. C. 34 Am. Rep. 323.  
 Ill. Mut. F. Ins. Co. v. Archdeacon, 82 Ill. 236; S. C. 25 Am. Rep. 313.  
 Franklin F. Ins. Co. v. Chicago Ice Co. 36 Md. 102; S. C. 11 Am. Rep. 469.  
 Grattan v. Met. L. Ins. Co. 80 N. Y. 281; S. C. 36 Am. Rep. 617.  
 Smith v. Niagara F. Ins. Co. 60 Vt. 682; S. C. 6 Am. St. Rep. 144.  
 Cent. City Ins. Co. v. Oates, 86 Ala. 558; S. C. 11 Am. St. Rep. 67.  
 Phenix Ins. Co. v. Bowdre, 67 Miss. 620; S. C. 19 Am. St. Rep. 326.
- As to waiver of condition in respect to vacancy:  
 Short v. Home Ins. Co. 90 N. Y. 16; S. C. 43 Am. Rep. 138.  
 Gans v. St. Paul F. & M. Ins. Co. 43 Wis. 108; S. C. 28 Am. Rep. 535.  
 City, etc., Co. v. Merch. etc., F. Ins. Co. 72 Mich. 654; S. C. 16 Am. St. Rep. 552.



accept premiums after they are due, to show a waiver of a clause requiring prepayment.<sup>1</sup>

As to condition as to mode of occupancy:

Am. Cent. Ins. Co. v. McCrea, 8 Lea, 513; S. C. 41 Am. Rep. 647.

Carrigan v. Lycoming F. Ins. Co. 53 Vt. 418; S. C. 38 Am. Rep. 687.

Viele v. Germania Ins. Co. 26 Iowa, 9; S. C. 96 Am. Dec. 83.

Kruger v. West, F. & M. Ins. Co. 72 Cal. 91; S. C. 1 Am. St. Rep. 42.

Menk v. Home Ins. Co. 76 Cal. 51; S. C. 9 Am. St. Rep. 158.

*Contra*: Franklin F. Ins. Co. v. Martin, 11 Vroom. 568; S. C. 29 Am. Rep. 271.

As to waiver of condition in respect of representation of title, by knowledge of agent:

Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389; S. C. 26 Am. Rep. 364.

Germania F. Ins. Co. v. Hick, 125 Ill. 361; S. C. 8 Am. St. Rep. 384.

As to non-waiver of condition:

Northwestern L. Ins. Co. v. Amerman, 119 Ill. 329; S. C. 59 Am. Rep. 799.

As to waiver of condition for limitation:

Little v. Phoenix Ins. Co. 123 Mass. 380; S. C. 25 Am. Rep. 96.

Ill. M. F. Ins. Co. v. Archdeacon, 82 Ill. 236; S. C. 25 Am. Rep. 313.

Bonnert v. Penn. Ins. Co. 129 Pa. St. 558; S. C. 15 Am. St. Rep. 739.

*Contra*: Waynesboro M. F. Ins. Co. v. Conover, 98 Pa. St. 384; S. C. 42 Am. Rep. 618.

As to waiver of condition for arbitration:

Nurney v. Fireman's Fund Ins. Co. 631 Mich. 633; S. C. 6 Am. St. Rep. 338.

Farnum v. Phoenix Ins. Co. 83 Cal. 246; S. C. 17 Am. St. Rep. 233.

Cont. Ins. Co. v. Wilson, 45 Kans. 250; S. C. 23 Am. St. Rep. 720.

As to waiver of condition against assignment:

Stolle v. Aetna F. & M. Ins. Co. 10 W. Va. 546; S. C. 27 Am. Rep. 593.

Penn. Ins. Co. v. Bowman, 44 Pa. St. 89. Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460; S. C. 2 Am. St. Rep. 686.

Phenix Ins. Co. v. Bowdre, 67 Miss. 620; S. C. 19 Am. St. Rep. 327.

As to waiver of condition about intemperance:

Pomeroy v. Rocky Mt., etc., Inst. 9 Colo. 295; S. C. 59 Am. Rep. 144.

Dibble v. North. Ass. Co. 70 Mich. 1; S. C. 14 Am. St. Rep. 470.

As to waiver of condition about disclosure of bodily infirmity:

Follette v. U. S. Mut. Acc. Assn. 107 N. C. 240; S. C. 22 Am. St. Rep. 878.

As to waiver of condition in respect to residence:

Walsh v. Aetna L. Ins. Co. 30 Iowa, 133; S. C. 6 Am. Rep. 664.

As to waiver of misrepresentation of character of occupant:

Fitzpatrick v. Hartford L. & A. Ins. Co. 56 Conn. 116; S. C. 7 Am. St. Rep. 288.

As to waiver of condition in respect to keeping books and invoices:

Brown v. State Ins. Co. 74 Iowa, 428; S. C. 7 Am. St. Rep. 495.

As to waiver of privilege of sixty days for paying loss:

Cal. Ins. Co. v. Gracey, 15 Colo. 70; S. C. 22 Am. St. Rep. 376.

As to waiver of forfeiture for foreclosure proceedings:

Titus v. Glens Falls Ins. Co. 81 N. Y. 410.

<sup>1</sup> Girard L. Ins. Co. v. M. L. Ins. Co. 86 Pa. St. 236.

Baxter v. Insurance Co. 13 Allen, 320.

*Contra*: Busby v. N. A. etc. Ins. Co. 40 Md. 572.

Candee v. Citizens' Ins. Co. 4. Fed. Rep. 143.

Mut. Ben. Life Ins. Co. v. Ruse, 8 Ga. 534.

## CHAPTER XI.

## PATENT AMBIGUITIES.

**Sec. 49. Patent ambiguities.**

Parol evidence is admissible in respect to the subject matter, the situation and relations of the parties and all the circumstances, to explain any ambiguity apparent upon the face of the instrument; but mere evidence of intention, except as derivable from such proof, is incompetent in respect to such patent ambiguity.

*Lord Bacon's maxim:* A great deal is said in the law books about latent and patent ambiguities, and the rule is enunciated by some writers on evidence, founded on a remark of Lord Bacon, that latent ambiguities may be explained by parol, but that patent ambiguities cannot be so explained. Here and there too is found the remark that an ambiguity may not be created by parol. "Such ambiguities," said Parsons, C. J., in *Storer v. Freeman*, 6 Mass. 435; S. C. 4 Am. Dec. 155, "must be removed by a sound construction of the words of the deed." So parol evidence was held incompetent at law in *Newcomer v. Kline*, 11 G. & J. 457; S. C. 37 Am. Dec. 74, to supply the word "dollars," accidentally omitted from a bill single. So it was held, *obiter*, in *White v. Hermann*, 51 Ill. 243; S. C. 90 Am. Dec. 543. A remark to the same effect was unnecessarily made in *Panton v. Tefft*, 22 Ill. 366. The same was said in *McNair v. Toler*, 5 Minn. 435, in respect to an insensible description of land in a receipt, and precisely the same is the effect of *Campbell v. Johnson*, 44 Mo. 247. In the last two cases the court held that the remedy was by suit for reformation. This old doctrine is rejected by the modern decisions. "It will not do to say that a patent ambiguity cannot be explained by evidence *aliunde*, though such remarks are frequently found in the books." Cowen & Hill's Notes, 1359. In *Herring v. Boston Iron Co.*, 1 Gray, 138, is an excellent definition of "latent ambiguity": "The ambiguity is latent if it results from viewing the instrument in the light of the collateral facts or what may be

called the necessary extrinsic evidence." And again, in the language of Chief Justice Shaw, in *Sargent v. Adams*, 3 Gray, 78, "in coming to apply the description to the contract, and after all these means of exposition have been exhausted, there may remain an uncertainty in such application; this constitutes a latent ambiguity."

*Cowen's Criticism*: The subject was very learnedly considered by Cowen, J., in *Fish v. Hubbard's Admrs.* 21 Wend. 651. He says: But we are admonished again and again by the counsel for the defendants, that *ambiguitas patens* is non-explainable, and that every ambiguity is patent which appears upon the face of the instrument. Phil. Ev. 467, Am. ed. of 1823; Bacon's Elem. Rule 23. So says Lord Bacon, and he adds that '*ambiguitas patens* is never holpen by averment; and the reason is because the law will not couple and mingle matters of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so in effect that to pass without deed which the law appointeth shall not pass but by deed.' It is not necessary to deny this maxim as limited and explained by the examples which the author himself gives. They are only two: One of a gift to J. D. & J. S. *et hæredibus*, omitting to say the heirs of which. The other a gift in tail, remainder in tail; 'provided that if he, they or any of them do any,' etc., restraining them from certain acts in order to perpetuate the estate. In the first case you cannot aver whether the gift intended the heirs of J. D. or J. S., nor in the second that the proviso was intended only of him in remainder. In short, the rule is one of construction, applicable to the words of a deed, will, or any express contract, and it is confined to words which have no reference, by implication or otherwise, to matters out of the writing in question. This is obvious from what he adds immediately after his two examples: 'Of these, infinite cases might be put, for it holdeth generally that all ambiguity of words *by matter within the deed*, and *not out of the deed*, shall be holpen by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty.' It is impossible, if we take *ambiguity* in its broad sense of *doubtfulness, uncertainty and double meaning* (see Johnson's Dict.), to maintain Lord Bacon's maxim one moment when we compare it with the adjudged cases. Mr. Wigram has stated, and I think, solved, the extent of the

maxims. He says it may be asked whether the rule is not violated, when explanatory evidence, or evidence of collateral facts and circumstances, is admitted in aid of a description which *upon the face of the will* is inaccurate or imperfect. With confidence it is answered no. The inaccuracy of the testator's language in such cases is undoubtedly *patent*; but as the meaning of inaccurate (uncertain) language *may* be unambiguous, it is impossible to predicate of a will, in such cases, or in any case, that it is ambiguous until the effect of bringing the language into contact with the facts to which it refers has been tried." Then quoting from Wigram, Cowen adds that Bacon's examples are not cases of misdescription of the object of bounty or the subject of disposition, "but cases in which (the persons and things being sufficiently described) the testator's general intention with respect to them is ambiguously expressed." Judge Cowen then proceeds: "It is by such a course of reasoning alone that the rule can be saved. No one can deny that it is very loosely expressed, though a veneration for the great character of Lord Bacon as a logician has led English judges and writers on evidence into a constant repetition of it, without often advertng to its singular generality. It was never acted upon in its widest extent, and as far as the decisions have gone, it is said by a learned judge, that after several efforts, he has found himself unsuccessful in his attempts to reconcile them. Story, J., in *Peisch v. Dickson*, 1 Mason, 11."

*Story's view*: In the latter case Story admitted the general rule, but said: "There seems indeed to be an intermediate class of cases partaking of the nature of both patent and latent ambiguities, and that is where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case I should think that parol evidence might be admitted to show the circumstances," etc., and he allowed evidence to explain the word "freight."

It is apparent from the uniform tenor of more modern decisions that Lord Bacon's distinction is practically disregarded, and extrinsic evidence is always resorted to for explanation although the ambiguity is patent.

*Other authorities*: 1. In *Shore v. Miller*, 80 Ga. 93; S. C. 12 Am. St. Rep. 239, the court said parol evidence is admissible to explain an ambiguity in a deed, "whether latent or patent."

2. *Palmer v. Albee*, 50 Iowa, 429, was an action for specific performance of a promise by way of subscription to "pay twenty acres of land." It was held that the ambiguity could not be aided by parol. The court laid down these three rules: "*First*. Where the instrument seems to be clear and certain on its face, and the ambiguity arises from some extrinsic or collateral matter, the ambiguity may be helped by parol evidence. *Second*. Where the ambiguity consists in the use of equivocal words designating the person or subject matter, parol evidence of collateral or extrinsic matter may be introduced for the purpose of aiding the court in arriving at the meaning of the language used. *Third*. Where the ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is meant, the rule is inflexible that parol evidence cannot be submitted to supply the deficiency. About this last-named class of cases there cannot, under the authorities, be any question. They belong to the *ambiguitas patens* of Lord Bacon." Beck, C. J., dissented. This means nothing more than that the uncertainty is so hopeless that nothing short of proof of intention will help it out, and this is inadmissible. It comes within *Boardman v. Lessees of Reed*, 6 Peters, 328, where it is said: "If the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void." The contention of the chief justice was that there was no ambiguity; the contract was to convey twenty acres of land, and equity would compel him to convey some twenty acres, just as if he had contracted to sell "twenty head of cattle." This case is the most serious recent attempt to support Bacon's maxim, and it does not seem effectually to do it.

3. Starkie says (Ev. 653): "By patent ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applicable to the instrument itself, or by evidence showing that terms in themselves, unmeaning or unintelligible, are incapable of receiving a known conventional meaning."

4. Jones says (Const. Cont. § 51): "It arises only when no intention is derivable from the language, viewed with all the light which the law permits."

5. In *Colpoys v. Colpoys* (Jacob, 451), it is said: "When the person or thing is designated on the face of the instrument by

terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument."

6. Broom says (Com. Law, 504): "It would nevertheless be erroneous to suppose that extrinsic evidence is, under no circumstances, admissible to clear up a *prima facie* patent ambiguity in a written contract, for proof of facts may be given with a view to showing that the apparent uncertainty does not in truth exist."

7. Greenleaf says (1 Ev. 13th ed. § 298): "No judge is at liberty to pronounce an instrument ambiguous or uncertain, until he has brought to his aid, in its interpretation, all the light afforded by the collateral facts and circumstances, which, as we have shown, may be proved by parol."

8. Stephen says: "If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say." This is adopted by Wharton (2 Ev. 3d ed. §§ 956, 957).

9. Taylor says (2 Ev. § 1213) that Bacon's maxim "has been cited, more out of respect for that great man, than in the expectation that it will afford much practical information." And at § 1226 he says that if the language is insensible with reference to extrinsic circumstances, proof of collateral facts may be given to effectuate the instrument, if possible.

10. The latest writer on Wills (Schouler Wills, § 581) says of Bacon's rule: "The argument moreover derived from mingling proof of the higher and lower, or equal quality, is rather fanciful and misleading for employment in our age, antedating, as it does, the legislation of the last two centuries, which inspires our modern policy of written, signed, and attested wills. Lord Bacon's illustrations were good, but practice carried the force of his rule beyond his own examples; and his distinction of patent and latent, though convenient in some respects, can hardly serve as a criterion."

11. In *Ganson v. Madigan*, 15 Wis. 153, the court said: "The word 'team,' as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six, or even more of either kind of beasts. We look upon the contract

and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject matter in contemplation at the time. It is an uncertainty, arising from the uncertain and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. The question is, can extrinsic evidence be received to explain it? We think it can. There is undoubtedly some confusion in the authorities upon this subject, especially if we look to the earlier cases; but the later decisions seem to be more uniform."

12. In a recent case, *Giddings v. Lea*, — Tex. —, 19 S. W. Rep. 682, the question was of the sufficiency of a description of land in a deed, and the court observed: "The ruling of the court in this respect was evidently based on the face of the deed, and the correct rule in reference to the duty of a court, when called upon to pass upon such a question, is that stated in *Kingston v. Pickins*, 46 Tex. 101, as follows: 'The construction of a deed, being matter of law, is for the court. If therefore the land intended to be conveyed by it be so inaccurately described that it appears, on an inspection of the deed, the identity of the land is altogether uncertain, and cannot be determined, the court should pronounce it void; but when the uncertainty does not appear upon the face of the deed, but arises from extraneous facts, as in other cases of latent ambiguity, parol evidence is admissible to explain or remove it. In such case the deed should not be excluded from the jury, but should go to them along with parol evidence, to explain or remove ambiguity; and the identity of the land is then a mixed question of law and fact, to be determined by the jury under the instructions of the court.' This rule is as applicable to deeds made to consummate sales made by sheriffs under executions as to deeds made by private persons. *Wilson v. Smith*, 50 Tex. 369. Looking to the description of the land contained in the sheriff's deed, we ascertain that the quantity of land sold was one-third of a league, and that this was known as 'Survey No. 280,' which would be very indefinite; for probably a survey for some quantity of land having that number might be found in most of the surveyors' districts in the State. But the locality as well as the area of the survey is given. The survey for that

quantity of land, and bearing that number, is declared to be 'on David's creek,' which is identified as a creek of that name, which is a tributary of the Colorado River, and enters that stream about twelve miles below the mouth of the Concho. If this was the only description of the land given in the deed, no court could say that the land might not be identified by it, and found by a person familiar with the locality thus generally described; but it is suggested that the sheriff's deed locates survey No. 280 about one mile from the mouth of the Colorado River, and declares that it was patented on October 15, 1851, and that these are inconsistent with the other matters referred to for description. To this it must be replied that the inconsistency does not appear in the face of the description, but only becomes apparent when we look to facts outside the description given in the deed; and this but presents the case of a latent ambiguity, which may be removed by extrinsic evidence; and that such evidence may consist in part of proof of facts of which the courts of this State would take judicial notice is unimportant. The land in controversy is situated in Coleman county, and this court may take judicial notice of the fact that the territory now embraced in that county was, at one time, a part of Travis county; as it may of the further facts that the Colorado River is the southern boundary of Coleman county, and that the Concho River is a tributary of the Colorado, emptying into that stream far above the city in which this court is now sitting, while the mouth of the Colorado is in Matagorda county, which is one of the counties of the State bordering on the Gulf of Mexico. From this it would be known that land on a tributary of the Colorado River, entering into that stream about twelve miles below the mouth of the Concho, could not be situated about one mile from the mouth of the Colorado River; and so much of the description should be disregarded, in view of the combination of other descriptive facts contained in the deed, which show clearly that the call for the land at a place about one mile from the mouth of the Colorado River was made by mistake, when the call for the land should have been at a place on David's Creek, about one mile from the mouth of that stream. The parol testimony offered would have clearly identified the land in controversy with that described in the sheriff's deed, and in the patent offered in evidence, and should have been admitted with the deed. The fact, which the deed, states that the patent bore date October 15, 1851, was so stated by mistake, is evident from the



fact that the deed bears date September 2, 1851, while the true date of the patent was October 15, 1850."

*Conclusion:* So in the last solution, Lord Bacon's famous and much-vexed maxim seems to amount to no more than this: An incurable ambiguity is fatal. Such ambiguity is very rare, but a recent case furnishes an example. In *Schattler v. Cassinelli*, Supreme Court of Arkansas, 19 S. W. Rep. 746, where land, which it was agreed was in the form of a trapezoid, was described in a tax deed as follows: "E. part N.  $\frac{1}{2}$  S. E.  $\frac{1}{4}$  sec. 27, town 2, range 12 W., containing 7.54 acres," and there was nothing, such as a recital of ownership, to assist in its identification, it was held that the description is insufficient. The court said: "It is clear that any tract of the requisite area, taken out of the east half of the 20-acre tract, would in a general sense come within the description, and it is impossible to determine just what was intended, unless there is some rule of legal construction that gives to the description a meaning different from its popular acceptance. The appellant contends that such is the case, and that the law intends from the description a tract of the stated area, in the form of a parallelogram, described upon the east line of the larger tract as a base, with the north and south lines as laterals. Such is the rule often applied by courts in construing descriptions as between parties to them, where there is a clear intention shown to affect some part of a definite tract, and the parties furnish no other means to identify the part. But this rule is not unbending even in such cases, and yields to a proper showing that the parties intended otherwise; and proof that the party acting upon the land owned but one tract coming within the description, and it not in a parallelogram, has been permitted to control. Therefore if the rule apply at all in cases where the description is not made by the owner, and is found in proceedings that prejudicially affect him, it could not govern in this case, because the circumstances and the claim made by the appellant show that the intention was to sell a tract not in a parallelogram. When the circumstances rebut such intention and supply no other, the description is left uncertain and meaningless, and does not inform the owner that he is liable to lose his land, or the purchaser what he is buying. The case of *Stewart v. Aten's Lessee*, 5 Ohio St. 257, presents a description strikingly similar to the one under consideration, and it was adjudged void for uncertainty, for the reason stated by us. But if there was nothing in the circumstances to rebut the presump-

tion of an intention to sell a parallelogram, it may be seriously doubted whether the description, standing alone, would come within the rule invoked, and be held sufficiently definite; for in cases where such descriptions have been aided by the rule, it appeared, either by direct recital in the description or from the circumstances, who owned the land intended, and the ownership indicated was held sufficient to perfect the identification. *Judd v. Anderson*, 51 Iowa, 346, may be cited as an example. In this case we find nothing in the description itself or in the circumstances to indicate who owned the land sold for taxes; and as ownership was not disclosed as a means of identification it may be questioned whether the description before us could in any case be adjudged sufficient.”<sup>1</sup>

<sup>1</sup> Prof. James B. Thayer, of Harvard Law School, in his recent “Select Cases of Evidence,” remarks: “Those do wisely, such as Wigram and Stephen and Nichols (in his excellent article in the *Juridical Society Papers*, ii., 331), who, in dealing with the parol-evidence rule, reject the use of Lord Bacon’s maxim and commentary upon ambiguity. It does not

help; it confuses. It is inextricably connected with a hopeless mass of mere jargon in our later books; and it cannot be understood by the mere reading of it, —you must turn on the light of a knowledge of the legal conceptions which were peculiar to the time, and of their fanciful and pedantic style of expression.”

## CHAPTER XII.

## INCOMPLETE AGREEMENTS.

SEC. 50. Omissions and collateral agreements.

51. Character of the additional matter.

**Sec. 50. Omissions and collateral agreements.**

Where the instrument does not express the entire agreement, and does not appear to express the entire agreement, or there is a collateral agreement not embraced therein, parol evidence is competent to show the omitted part, whether contemporaneous or antecedent, if it does not conflict with the instrument.<sup>1</sup>

*Incompleteness need not be manifest:* Mr. Freeman says, in a note to *Green v. Batson*, 5 Am. St. 194 (S. C. 71 Wis. 54): "No citation of authority is necessary to substantiate the rule that where, in the absence of fraud, accident or mistake, the parties

<sup>1</sup> *West v. Kelly*, 19 Ala. 353; S. C. 54 Am. Dec. 192.

*Hahn v. Doolittle*, 18 Wis. 196; S. C. 86 Am. Dec. 757.

*Cobb v. Wallace*, 5 Coldw. 539; S. C. 98 Am. Dec. 435.

*Hersom v. Henderson*, 21 N. H. 224; S. C. 53 Am. Dec. 185.

*Blossom v. Griffin*, 13 N. Y. 569; S. C. 67 Am. Dec. 75.

*Chapin v. Dobson*, 78 N. Y. 74; S. C. 34 Am. Rep. 512.

*Cassidy v. Begoden*, 38 N. Y. Super. 180.

*Harvey v. Million*, 67 Ind. 90.

*Doty v. Martin*, 32 Mich. 462.

*Hubbard v. Marshall*, 50 Wis. 322.

*Knight v. Knotts*, 8 Rich. L. 35.

*Coates v. Sangston*, 5 Md. 121.

*Fiske v. McGregor*, 34 N. H. 414.

*Nissen v. Genesee Gold Min. Co.* 104 N. C. 309.

*Peterson v. Chic., etc.*, R. Co. 80 Iowa, 92.

*Shaw v. Mitchell*, 2 Metc. 65.

*Singer Manuf. Co. v. Forsyth*, 108 Ind. 334.

*Kalamazoo Works v. Macalister*, 40 Mich. 84.

*Bryan v. Hunt*, 4 Sneed. 543; S. C. 70 Am. Dec. 262.

*Beyerstedt v. Winona Mill Co.* — Minn. —; 51 N. W. Rep. 619.

*Chester v. Bank of Kingston*, 16 N. Y. 336.

*Juilliard v. Chaffee*, 92 N. Y. 529.

*Barker v. Bradley*, 42 N. Y. 316; S. C. 1 Am. Rep. 521.

*Katz v. Bedford*, 77 Cal. 319.

*Johnston v. Patterson*, 86 Ga. 725.

*Thomas v. Hammond*, 47 Tex. 42.

*Bradstreet v. Rich*, 72 Me. 233.

*Jeffery v. Walton*, 1 Stark. 213.

*Allen v. Pink*, 4 M. & W. 140.

have deliberately put their contract into a writing, which is evidently complete in itself, and couched in such language as imports a legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto, and consequently all prior conversations and negotiations are deemed to be merged therein, and parol evidence of conversations held between the parties, or of declarations made by either of them, whether before or after the completion of the contract will be rejected. But where the contract as expressed in the writing is manifestly incomplete, parol evidence is admissible to show a contemporaneous agreement that the property should be of a particular quality, kind or quantity; or if such contract consists of an informal bill or receipt, not intended to embrace the entire contract, parol evidence of a warranty is admissible." This seems an accurate statement, except as to the limitation of the admissibility of parol evidence to cases where the writing is "manifestly incomplete." There are some remarks in the adjudications which seem to bear out this limitation. Thus in *Hei v. Heller*, 53 Wis. 415, it is said that "if it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is inadmissible." So in *Crane v. Association*, 5 Dutch. 305, it is said, if the papers "on their face are fragmentary, and do not purport to be an entire and complete contract, the parol contract is not held to be merged in them," etc. So in *Naumberg v. Young*, 44 N. J. L. 341, the court said that to warrant the admission of parol evidence, "the promise must not only be collateral, but must, as in *Lindley v. Lacy*, relate to a subject distinct from that to which the written contract applies." But it seems clear from the cases that to furnish a basis for the admission of parol evidence the incompleteness need not be apparent on the face of the instrument, and the evidence is admissible, unless the instrument on its face conclusively appears to be complete. If the instrument, construed in view of the circumstances in which, and the purposes for which, it was executed—which evidence is always admissible to put the court in the position of the parties—"shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there," as Earle, C. J., says in *Lindley v. Lacey*, 17 C. B. (N. S.) 578. But if in this view it does not appear to have been meant to show

the whole bargain, then evidence of the collateral or additional agreement is admissible so long as it is not inconsistent with what is written. On this reasoning alone can the decisions be harmonized, and on this reasoning very little conflict or difficulty will appear. For example: on a lease of "a hotel and the furniture therein," oral evidence of an agreement to put in more furniture would not be admissible, for it would be inconsistent with the apparent intention to let the hotel with its present furniture alone; but on a lease of a hotel, containing furniture, but without mention of furniture, parol evidence of an agreement to lease the furniture therein would be admissible, upon parol evidence of an agreement to include the furniture, or of the purpose to let and hire the premises for a hotel, and showing no intention to exclude or reserve the furniture. Greenleaf has expressed the rule in this particular more simply and correctly than some other text-writers and many judges, when he says (1 Ev. § 284a): "Nor does the rule apply in cases where the original contract was verbal and entire, and a *part only* of it was *reduced to writing*." (The italics are his.) So Jones says such evidence is competent "where the writing is manifestly informal and incomplete. Where the oral agreement is a collateral contract consistent with the writing." Jones Const. Cont. 184. And the correct rule is exactly expressed in *Thomas v. Scutt*, 127 N. Y. 138: "1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract. 2. The parol evidence must be consistent with and not contradictory of the written instrument." In fact, the whole question is solvable under the latter sentence; for if the writing clearly appears to be complete, the parol addition must necessarily be contradictory of it, and consequently is not admissible. Therefore any parol addition not contradictory is admissible.

Stephen, in his digest of the Law of Evidence, after stating the rule that oral evidence is inadmissible to contradict, alter, add to or vary the terms of a written contract, grant or other disposition of property, adds five exceptions, the second being as follows: "2. The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the

court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." Art. 90.

Taylor, in his treatise on the Law of Evidence, says: "The rule does not prevent parties to a written contract from proving, that either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter. Still less, as will presently be shown, does the rule exclude evidence of an oral agreement, which constitutes a condition on which the performance of the written agreement is to depend." § 1038. "It is almost superfluous to observe, that the rule is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter." § 1049.

Earle, C. J., in *Lindley v. Lacey*, 17 C. B (N. S.) 578, states the rule thus: "If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced. In some of the cases, as in *Harris v. Rickett*, 4 Hurlst. & N. (N. S.) 1, there was a prior verbal agreement. In *Davis v. Jones*, 17 C. B. 625, the oral and the written agreement were contemporaneous. So in *Wallis v. Littell*, 11 C. B. (N. S.) 369, there was a contemporaneous oral agreement. \* \* \* It is clear therefore that if there be a distinct collateral oral agreement between the parties, it is immaterial whether it precedes or is contemporaneous with the written agreement."

In *Erschine v. Adeane*, L. R. 8 Ch. App. 756; S. C. 6 Moak Eng. 594, Mellish, L. J., said: "No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterward reduce it to writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but nevertheless what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself."

In *Shughart v. Moore*, 78 Penn. St. 469, the tenant sued the

landlord, averring, in substance, that the landlord agreed with him if he would tend a certain farm on the shares, he, the landlord, would build a barn for his use by harvest, and that he failed to do so, to his damage. Sharswood, J., said: "The cases of *Weaver v. Wood*, 9 Barr, 220, and *Powelton Coal Co. v. McShain*, 25 P. F. Smith, 238, are full to the point that the offer of evidence complained of in the first assignment of error ought to have been received. These cases settle beyond all question that where a promise is made by one party in consideration of the execution of a written instrument by the other, it may be shown by parol evidence."

In *Taylor on the American Law of Landlord and Tenant* it is said: "But distinct and separable provisions, whether contemporaneous with or prior to the execution of a deed or written lease, will not be merged therein if clearly collateral." § 44.

Redfield, C. J., says in *Winn v. Chamberlin*, 32 Vt. 318: "And a written memorandum of a transaction will never exclude proof of stipulations not contained in the writing, where both parties agree that the writing shall not contain the whole contract, unless the additional matters are inconsistent with the writing."

*Illustrations of rule:* 1. This principle is illustrated in two early leading cases. In the one there was a memorandum of the hiring of a horse as follows: "Six weeks at two guineas. William Walton, Junior." Lord Ellenborough admitted oral evidence of the hirer's assuming all damages which might result from his shying—"suppletory matter as part of the agreement."<sup>1</sup>

2. In the other the memorandum was as follows: "Bought of G. P. a horse for the sum of £7 2s. 6d. G. P." Lord Abinger admitted evidence of an oral warranty, characterizing the memorandum as "an informal receipt for the money, not as containing the terms of the contract itself."<sup>2</sup>

3. Thus parol evidence was received in *Hahn v. Doolittle*, 18 Wis. 196; S. C. 86 Am. Dec. 757, to add a warranty to a written assignment of a note and mortgage. The court said the general rule "is not applicable to instruments which from their very nature do not attempt to state the entire agreement in respect to the subject-matter, but are adopted merely to transfer title, in execution of an agreement they do not profess to show." So in *Cobb v. Wallace*, 5 Coldw. 539; S. C. 98 Am. Dec. 435, to add to a

<sup>1</sup> *Jeffery v. Walton*, 1 Stark. 213.

<sup>2</sup> *Allen v. Pink*, 4 M. & W. 140.

receipt for a barge of coal with an agreement to pay three dollars a day until returned, an agreement that the barge was to be used only to carry the coal to market and to be returned as soon as discharged. So in *Hersom v. Henderson*, 21 N. H. 224; S. C. 53 Am. Dec. 185, and in *Atwater v. Clancy*, 107 Mass. 369, and *Adams v. Gray*, 8 Conn. 11; S. C. 20 Am. Dec. 82, to add a warranty to a receipted bill of sale of chattels. So in *Blossom v. Griffin*, 13 N. Y. 569; S. C. 67 Am. Dec. 75, to add to a receipt for goods to be forwarded, an antecedent agreement to transport plaintiff's goods generally as carriers.

4. So in *Chapin v. Dobson*, 78 N. Y. 74; S. C. 34 Am. Rep. 512, to add to a contract of sale of machinery a guaranty that it should work satisfactorily.<sup>1</sup> In this case the court said, at page 514: "It does not apply therefore where the original contract was verbal and entire and part only reduced to writing. *Potter v. Hopkins*, 25 Wend. 417; *Batterman v. Pierce*, 3 Hill, 171; *Grierson v. Mason*, 60 N. Y. 394. Nor has it any application to collateral undertakings. *Lindley v. Lacey*, 17 C. B. (N. S.) 578, and cases cited below. And these facts are always open to inquiry, and may be proved by parol. *Filkins v. Whyland*, 24 N. Y. 344; *Stephen's Dig. of Law of Ev.*, ch. 12, art. 90.

"In *Jeffery v. Walton*, 1 Stark. 213, the contract for the hire of a horse was in writing, and it was further agreed by parol that accidents occasioned by his shying should be at the risk of the hirer. The horse shied and in consequence was injured. In a suit for damages it was held that parol evidence of that portion of the agreement which was not in writing was admissible. In *Batterman v. Pierce*, 3 Hill, 171, the action was upon a note given for wood on plaintiff's land. The defense was a verbal agreement made at the same time by plaintiff, that if anything happened to the wood through his means, or by setting fire to his fallow, he would be accountable and would guarantee the purchaser against

<sup>1</sup> The writing was as follows: "Philadelphia, July 9, 1868. We agree to furnish John Dobson with the following machinery, on terms stated: Sixteen 48-inch and seven 60-inch First Breaker Feeders, at three hundred dollars each, delivered at depot at Pawtucket, R. I., to be sent by steamer from Boston to Philadelphia, and allowance of three dollars to be made on each machine for freight.

Man's time and expenses from Philadelphia to be charged extra for applying the machines. Terms, cash on delivery, 5 per cent. commission to be allowed on each machine. Five 60-inch and four 48-inch to be delivered as soon as possible, the balance in thirty days thereafter. Harwood & Quincy, agents for Chapin & Downes. I agree to the above. John Dobson."



any damages in consequence of firing his fallow—the fallow was burned and the wood also—the defense prevailed, the court holding that the same result would follow, whether the contract of both parties had been written out, or whether all rested in parol without writing, saying ‘nor can it make any substantial difference that the undertaking of one party has been reduced to writing the engagement of the other party remains in parol’—and to the objection that the defense contradicted the note said there was ‘nothing in it.’ ‘The defendants do not deny that they made such a contract as that on which the plaintiff seeks to recover, but they allege that the plaintiff at the same time entered into an engagement on his part which has subsequently been broken;’ and the same may be said of the parties in the case in hand. The later cases of *Morgan v. Griffith*, L. R., 6 Ex. 70, and *Erskine v. Adeane*, L. R., 8 Ch. App. 756, explain the exception contended for and the principle upon which the ruling of the referee stands. They were considered by this court in *Johnson v. Oppenheim*, 55 N. Y. 280–293, and there said to be within the rule which allows a collateral agreement made prior to or contemporaneous with a written agreement but not inconsistent with or affecting its terms, to be given in evidence. Other examples to that effect are *Unger v. Jacobs*, 7 Hun, 220; *Bookstaver v. Glenney*, 3 T. & C. 248, affirmed in this court. The case before us may be added to the same class, without disturbing the decision of this court in *Wilson v. Deen*, 74 N. Y. 531, on which the appellants rely. There the plaintiff sought to cancel a lease upon the ground that the defendant failed to perform an oral agreement concerning a matter embraced in and covered by its terms. It was held that his case was directly within the general rule above stated, and the court advert to the fact that it was not claimed to be within the principle which upholds an oral or parol agreement when collateral to a written instrument contemporaneously executed, and say if it had been so claimed it would have been unavailing, as in such a case the only remedy would be an action for damages for the breach of the parol contract. These distinctions are clearly pointed out in that case and are illustrated in *Angell v. Duke*, L. R., 10 Q. B. 174, and *Mann v. Nunn*, 43 L. J. (N. S.), C. P. 241. In *Angell v. Duke* the plaintiff was held entitled to recover damages for the breach by the lessee of an agreement similar to that in *Wilson v. Deen*, *supra*, the court holding it to be collateral to the demise and the case analogous to *Morgan v. Griffith*, *supra*. So

in *Mann v. Nunn*, where a lessor promised that if the proposed lessee would take the lease of a house, he would put the house in a state fit for habitation, the promise was held to be collateral to the written lease, and provable by parol evidence for the purpose of recovering damages for the breach of it."

The court continuing said: "The guaranty as made does not contravene the written contract, and is not inconsistent with it. If the fitness of the machine is implied, the guaranty is in harmony with it and adds nothing; if it is not implied the paper contains no declaration that the machines shall be taken with all faults and insufficiencies, or at the defendant's risk. The parol evidence therefore contradicts no term of the writing nor varies it.

"The written contract and the guaranty do not relate to the same subject-matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner or with a certain effect, or as in this case, that they shall do the buyer's work satisfactorily. The first would be performed by the delivery of machines answering the description or the specifications of the patent; and whether they did or not conform thereto would be the only inquiry. As to the other, it in no respect touches the first, nor does it operate as a defeasance, but leaves it valid and to be performed, and the consequences of a breach of the guaranty are a recoupment or abatement of damages in favor of the defendant, and this is so, whether the contracts are in writing or not; for the guaranty is valid although not in writing, and the same rule must apply, for in either case the relation of the guaranty to the contract would be the same. In *Heyworth v. Hutchinson*, L. R., 2 Q. B. 447, the defendants bought of the plaintiffs a specific quantity of wool, then at sea but expected to arrive; 'the wool to be guaranteed about similar to certain samples' referred to. The defendants refused to receive the wool, alleging that it was not similar to the samples, and being sued for non-acceptance set up that fact as a defense. The court held it invalid, that the contract was for specific goods, and therefore the clause of guaranty was only collateral to the contract, and so the buyer could not reject the wool on the ground that it was not conformable to the sample, but his rem-

edy would be either by a cross action on the guarantee or by giving the infirmity in evidence in reduction of damages. This case is in point. It seems plain, both upon principle and authority, that the plaintiffs' undertaking was collateral to the contract by which they undertook to furnish the machines, and that the referee committed no error in receiving the evidence objected to."

*Criticisms on Chapin v. Dobson:* The contract in this case is pronounced "informal," in *Naumberg v. Young*, 44 N. J. L. 331, and by Mr. Jones (Const. Trade Cont. secs. 142, 143, 153). It is true that the contract was not drawn in legal and professional phraseology; it is apparent that it was not drawn by a lawyer; it was evidently a memorandum drawn by merchants. In this sense it unquestionably was "informal." But it was not inexplicit nor ambiguous. On the contrary, so far as it went, it was very explicit. It can hardly be maintainable that oral evidence is competent to add to a contract merely because it is not drawn by a professional person nor in legal language. This is not the informality intended by the law. The law here refers to imperfect contracts. The contract in *Chapin v. Dobson*, notwithstanding its informality, was a perfect contract so far as it professed to go, and no charity may reasonably be claimed for it on the score of informality. It must be taken as a ruling that although a contract may be complete on its face, yet an addition may be made to it if not inconsistent with it; and in this view the decision seems well maintainable.<sup>1</sup>

5. A very recent instance of the addition of an oral warranty is found in a decision of the Massachusetts Supreme Judicial Court,"<sup>2</sup> although the decision is based as well upon the theory of subsequent oral modification. The court said, by Morton, J.: "In the present case it appears that the contract relied on was a

<sup>1</sup> In the sixth American edition of Benjamin on Sales, Mr. Edmund H. Bennett, the American editor, says in a note: "If the article is sold by a formal written contract, or a regular bill of sale, which is silent on the subject of warranty, no oral warranty made at the same time, or even previously, can be shown, since the writing is conclusively supposed to embody the whole contract. For the same reason no additional oral warranty can be engrafted on or added to one that is written.

\* \* \* But this rule \* \* \* does

not apply to an informal 'bill of parcels,' as it is called." The editor cites *Eighmie v. Taylor*, but takes no note of *Chapin v. Dobson*. Mr. Corbin, the editor of the fourth American edition, expresses the opinion that it is difficult to reconcile the decision with others (§ 203, note 2; § 209 note 6). The decisions in the *Chapin* and *Eighmie* cases were pronounced by the same judges, with the exception of the chief judge, and both were unanimous.

<sup>2</sup> *Thomas v. Barnes*, — Mass. —, 31 N. E. Rep. 683.

bilateral, executory one. Duplicate papers were prepared, apparently with the expectation that they were to be signed by both parties, and one retained by each. Only one was signed, and that was signed by Barnes alone. It was given to Thomas by Barnes, and remained in his possession, but he did not sign it. Barnes offered to show that it was agreed by the parties that this paper was only a partial memorandum, and that it did not contain all the provisions of the contract, and that as part of the contract Thomas orally warranted the refrigerator. The paper signed by Barnes was consistent on its face with the view that it was intended by the parties merely as specifications, and not as containing the whole contract. The conduct of Thomas in not signing it was also consistent with this view. If it was delivered by Barnes to Thomas, and assented to by the latter as containing the whole contract, their oral evidence as to previous or contemporaneous conversations would not be admissible to affect it. But whether it was so delivered to Thomas, and assented to by him, was a question of fact for the jury under suitable instructions. *Sears v. Railway Co.* 152 Mass. 151; *Wilson v. Powers*, 131 Mass. 539; *Bartlett v. Stanchfield*, 148 Mass. 394; *Durkin v. Cobleigh* (Mass.), 30 N. E. Rep. 474. We think therefore that the evidence should have been admitted. During the progress of the work a controversy arose as to the packing of the refrigerator. Barnes offered to show that Thomas then warranted the refrigerator, and that Barnes accepted the warranty. There was nothing in the specifications or in the alleged contract as to the packing or relating to a warranty. The court excluded the testimony; but we think it should have been admitted. It is well settled that an executory, bilateral written contract may be varied by a subsequent oral agreement between the parties. *Bartlett v. Stanchfield supra*; *Stearns v. Hall*, 9 Cush. 31; *Courtenay v. Fuller*, 65 Me. 156. The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract. *Munroe v. Perkins*, 9 Pick. 298; *Holmes v. Doane*, 9 Cush. 135; *Byington v. Simpson*, 134 Mass. 145; *Malone v. Dougherty*, 79 Pa. St. 46-53; *Courtenay v. Fuller, supra*; *Flanders v. Fay*, 40 Vt. 316; *Bishop v. Busse*, 69 Ill. 403; *Lattimore v. Harsen*, 14 Johns. 330; *Goss v. Nugent*, 5 Barn. & Adol. 58, 65. If therefore the paper writing had contained the whole contract, the

evidence was admissible for the purpose of showing that the parties subsequently modified it."

6. In *Boorman v. Jenkins*, 12 Wend. 566; S. C. 27 Am. Dec. 158, evidence was admitted to show that it was the usage of cotton brokers not to enter, in bills of sale, the fact that sales were made by sample. In an action on an insurance policy parol proof of an agreement that the mortgagee, the insured, should keep the premiums insured and the mortgagor should pay the premiums, was held competent in *Kernochan v. New York Bowery F. Ins. Co.* 17 N. Y. 428. Parol evidence may supply the date of an undated chattel mortgage, and identify the property described only as "now in store occupied," etc. *Burditt v. Hunt*, 25 Me. 419; S. C. 43 Am. Dec. 289. In a suit by a trustee in a deed of trust, to recover live stock referred to in the deed only by number, parol evidence is competent to identify it. *Barker v. Wheelip*, 5 Humph. 329; S. C. 42 Am. Dec. 433. A contract of sale was expressed to be "on the usual terms." It was held that parol evidence was proper to define the terms. *Lawrence v. Gallagher*, N. Y. In *Domestic Sewing Machine Co. v. Anderson*, — Minn. —, to a written agreement for hire and return of sewing machine on demand, a contemporaneous oral agreement for its sale was added by parol. In *Richard v. Wellington*, 66 N. Y. 308, evidence as to what account moneys credited in an account rendered were paid upon was held proper. In *Bonney v. Morrill*, 57 Me. 368, a stipulation was given in ejectment allowing a recovery for a specified portion of the land, but silent as to mesne profits. It was held that parol evidence was competent to show it covered the claim for mesne profits. On a written sale of a slave, warranting title, parol evidence is admissible to show a warranty of health and soundness. This "does not contradict or vary the bill of sale."

7. Parol evidence is admissible in an action for brokers' commissions, to show that a receipt and an agreement for deposit in escrow of a deed, at the time of an alleged sale, did not contain the entire agreement, but that there was a parol condition leaving the vendee at liberty to refuse to buy, and making the transaction a mere option to purchase.<sup>2</sup> *Finch, J.*, said: "The plaintiff sued on a written agreement for commissions. Relatively to that agreement the contract between Milliken and

<sup>1</sup> *McFarlane v. Moore*, 1 *Overton*, 174;    <sup>2</sup> *Condit v. Cowdrey*, 123 N. Y. 463.  
S. C. 3 Am. Dec. 752.

the defendant was a collateral matter, and one to which the plaintiff was neither a party nor a privy, and the papers themselves do not purport to contain the entire contract. In such a case the writing is not conclusive, but either party is at liberty to prove by parol what the contract really was.

8 In *Hope v. Balen*, 58 N. Y. 380, defendants held a lease of premises from plaintiff. It was orally agreed that defendants should surrender at the end of the quarter, and that plaintiff should release them from the quarter's rent. Defendants executed a writing upon the lease, and delivered it to the plaintiff, to the effect that it was agreed that the term unexpired at the end of the quarter was thereby cancelled. At the end of the quarter defendants surrendered possession. In an action to recover the quarter's rent, it was held that parol evidence was competent to show the whole agreement. "Where a verbal contract is entire, and a part only in part performance is reduced to writing, parol proof of the entire contract is competent."

9. When an agreement to employ a broker to buy land is silent as to his commissions, oral evidence of a prior agreement therefore is admissible.<sup>1</sup> But not to show that the deed was to contain certain peculiar restrictions and to be subject to the grantee's approval, the writing being silent on that matter.<sup>2</sup>

10. In *Filkins v. Whyland*, 24 N. Y. 338, the writing was as follows: "F. bought of W. one house, \$150. Received payment, W." Parol evidence of a warranty was approved, on the ground that it was not a contract of sale, but a mere receipt; "it admitted that a sale has been had, but does not effect one." The court tried to distinguish *Van Ostrand v. Reed*, 1 Wend. 424. Followed in *Perrine v. Cooley's Exrs.*, 39 N. J. L. 449. To the same effect, *Allen v. Pink*, 4 M. & W. 140.

11. In *Wendlinger v. Smith*, 75 Va. 309; S. C. 40 Am. Rep. 727, an executor contracted to sell land by a contract perfect and absolute on its face; but annexed was a paper purporting to be an approval of the contract by the devisees, signed and sealed by four, and with five other seals with no names attached. *Held*, that parol evidence was competent to show that the written approval of the nine devisees was a condition of the contract.

12. So, where a building contract binds the contractor to erect dwellings in accordance with drawings and specifications

<sup>1</sup> *Sayre v. Wilson*, 86 Ala. 151.

<sup>2</sup> *Id.*

alleged in the contract to be annexed thereto, but no drawings or specifications are annexed, oral evidence is competent to show what specifications are actually agreed upon. *Haag v. Hillmier*, — N. Y. —. A bill of sale may be shown by parol to be a mortgage.<sup>1</sup> In *Pierce v. Woodward*, 6 Pick. 206, on a sale of goods parol evidence was allowed to establish the condition that the vendor would not ply his trade in the same neighborhood.

13. So on a written lease of a hotel, parol evidence was allowed to establish a parol contemporaneous agreement by the lessor not to engage in a rival business in the same city.<sup>2</sup> And in *Lewis v. Seabury*, 74 N. Y. 409; S. C. 30 Am. Rep. 311, a written lease was silent as to fixtures, but parol evidence was permitted to show that for an independent consideration the lessor orally agreed that the lessee should have the use of certain fixtures.

14. Parol evidence is admissible to show that an absolute assignment of a bond and mortgage was intended as collateral security alone.<sup>3</sup> So of a deed of a patent.<sup>4</sup> So on a settlement of accounts, it may be shown that it was agreed that any balance found due the defendant should be applied on the purchase price of certain property.<sup>5</sup>

15. A mere bill of parcels may be shown to be a mortgage, but not so of a formal bill of sale.<sup>6</sup> But where there is a transfer by a formal bill of sale, a parol agreement as to the application of the proceeds of the goods when sold, is competent in evidence.<sup>7</sup>

16. In *Andrews v. Brewster*, 124 N. Y. 433, the plaintiff, entitled to share in the estate of C., released in writing a claim against the executor, B., for failing to rent property of the estate, upon receiving her share of the estate from him, and his oral agreement to leave her enough of his own estate to make good her loss. The oral agreement was held provable, on the ground that the release "was not the repository of the agreement between the parties, but its execution and delivery was one of the obligations under that agreement."

<sup>1</sup> *Clark v. Washington, etc., Ins. Co.*, 100 Mass. 509; S. C. 1 Am. Rep. 135.

<sup>2</sup> *Welz v. Rhodius*, 87 Ind. 1; S. C. 44 Am. Rep. 747.

*Contra*. *Scholz v. Dankert*, 69 Wis. 416.

<sup>3</sup> *Fullwood v. Blanding*, 26 S. C. 312.

<sup>4</sup> *Barry v. Colville*, 129 N. Y. 302.

<sup>5</sup> *Redfield v. Gleason*, 61 Vt. 220; S. C. 15 Am. St. Rep. 889.

<sup>6</sup> *Grant v. Frost*, 80 Me. 202.

<sup>7</sup> *Ewaldt v. Farlow*, 62 Iowa, 212.

17. To a bill of sale with the addition, "six per cent. off for cash," an oral agreement for six months credit may be added.<sup>1</sup> Where there was a receipted bill of sale of "good first and second-rate tobacco," it was held that oral evidence was admissible to show the terms of the agreement and to contradict the implication of a warranty.<sup>2</sup> On a sale of a milk-route and personal property, there was a bill of sale receipted, specifying the property and the gross price. Evidence was admitted that the seller orally promised not to peddle milk in that locality while the defendant carried on the business there.<sup>3</sup> The court said it was "a mere bill of parcels," and distinguished it from "a formal bill of sale," as in *Bassett v. Percival*, 5 Allen, 345. So an oral warranty of quality of tea was allowed to be proved in addition to an invoice stating quantity and price, and adding, "stored and insured free until river opens."<sup>4</sup> Where plaintiff and C. contracted to assign 150 bonds to defendant when issued, evidence was allowed that plaintiff and C. orally agreed with defendant and R. that seventy-five should go to C. or R., who should return them to plaintiff.<sup>5</sup> On a sale of cloves, where a bill of particulars was rendered, parol evidence was allowed to show what kind of cloves were agreed for.<sup>6</sup> On a contract for work, evidence was admitted as to the time when the work was to begin, the writing being silent on the point.<sup>7</sup>

18. Where there was a lease of a mill, the lessee to insure, and in case of total loss to make good the difference or replace the mill, evidence was admitted of an oral agreement that in case of total loss, and the lessee's option to replace, he was to have the insurance money.<sup>8</sup> So where a policy of insurance does not specify the place of payment of the premiums, the oral agreement therefor may be shown.<sup>9</sup> Where an order was given for a machine to be paid for by two horses twelve years old, evidence was admitted to identify the horses and show the representations about their age.<sup>10</sup> So where the order specified kinds and prices,

<sup>1</sup> *Linsley v. Lovely*, 26 Vt. 123.

<sup>2</sup> *Towell v. Gatewood*, 2 Scam. 22.

<sup>3</sup> *Stacy v. Kemp*, 97 Mass. 166.

See also *Atwater v. Clancy*, 107 Mass. 369.

<sup>4</sup> *Foot v. Bentley*, 44 N. Y. 167.

*Atwater v. Clancy*, 107 Mass. 369.

<sup>5</sup> *Snow v. Alley*, 151 Mass. 14; 23 N. E. Rep. 576.

<sup>6</sup> *Bradford v. Manly*, 13 Mass. 139; S. C. 7 Am. Dec. 122.

<sup>7</sup> *Case v. Phoenix Bridge Co.*, 34 N. Y. St. Rep. 581.

<sup>8</sup> *Cumming v. Barber*, 99 N. C. 332.

<sup>9</sup> *Blackerby v. Cont. Ins. Co.* 83 Ky. 574.

<sup>10</sup> *Jackson v. Mott*, 76 Iowa, 263.



and contained provisions as to rebate, and was signed only by the purchasers, who were jobbers, evidence was allowed that the sellers, the manufacturers, orally agreed to advertise the goods.<sup>1</sup>

19. Where title to a boat is in one, but half is owned by another, who desires to sell his interest to a third, and procures the former to execute a bill of sale of half to the third, in an action for the purchase price of such share parol evidence is competent to show the facts, as the bill of sale is not the written evidence of the contract between the beneficial owner and the purchaser, but the means of executing the contract.<sup>2</sup>

20. Where the written contract is uncertain in its terms, parol evidence of a subsequent agreement making the terms certain is admissible.<sup>3</sup>

21. Where a contract gave defendant the exclusive right to sell plaintiff's goods for a specified commission, but contained no guaranty as to the amount of commissions, parol proof that the sole object of the contract was to enable defendants to procure advances from third persons, and that the amount of commissions was guaranteed, was allowed.<sup>4</sup>

22. On a sale of lands and a store of goods, parol evidence is competent to add a contemporaneous oral agreement by the seller not to re-engage in the same business at that place.<sup>5</sup>

23. In *Bryan v. Hunt*, 4 Sneed, 543; S. C. 70 Am. Dec. 262, an action against a vendor for failure to deliver flour by a date specified in a written agreement, parol evidence was allowed of the purchaser's subsequent oral agreement, that if the tide did not rise in the river on which it was to be transported, it need not be delivered by that time.

24. In *Brigg v. Hilton*, 99 N. Y. 517, a writing acknowledged the receipt of an order for goods, and stated the time of delivery and the price. It was held that an oral warranty of quality might be proved, as the paper did not purport to be a complete contract, and even if conclusive as an agreement as to the part expressed, parol evidence was competent to show the rest. This was followed in *Routledge v. Worthington Co.* 119 N. Y. 597,

<sup>1</sup> *Ayer v. R. W. Bell Manuf. Co.* 147 Mass. 46.

<sup>2</sup> *Bennett v. Belt's Admr.* 22 Mo. 154; S. C. 64 Am. Dec. 260.

<sup>3</sup> *Katz v. Bedford*, 77 Cal. 319.

<sup>4</sup> *Grierson v. Mason*, 60 N. Y. 394.

<sup>5</sup> *Fusting v. Sullivan*, 41 Md. 162.

*Contra*: *Costello v. Eddy*, 128 N. Y. 650.

*Doyle v. Dixon*, 12 Allen, 576.

and in *Bach v. Levy*, 50 N. Y. Super. 519, oral evidence was admitted to add a guaranty to a contract for the sale of tobacco.

25. On a written sale of a sewing-machine an oral agreement to supply the buyer with work may be shown.<sup>1</sup> Where there is a contract to carry goods from A. to B., an oral agreement as to carriage beyond B. may be shown.<sup>2</sup> On the assignment of a cause of action an oral agreement of the assignee to pay the attorney's fees is provable.<sup>3</sup>

26. In *DeCamp v. Scofield*, 75 Mich. 449, an action on an agreement to pay a balance due on certain notes, parol evidence was held admissible to show that the plaintiff agreed first to endeavor to collect from the maker of the notes, and had failed to do so.

27. Where a shipping bill provided for carrying peaches from A. to B., evidence was allowed of an oral agreement previously made, to carry without change of cars.<sup>4</sup>

28. In *Juilliard v. Chaffee*, 92 N. Y. 529, the plaintiff gave in evidence a paper signed by the defendant, stating that he had "borrowed and received" of S. M. & Co. the sums claimed, and that the same was "payable to them, or order, with interest." The defendant was allowed to prove that the instrument was executed as part of a prior oral agreement of the payees to advance the money in anticipation upon debts owing by them, on the defendant's promise to apply it thereon at their maturity, and that the writing should be executed, but returned to the defendants when the money was so applied; and that defendants had applied the money as agreed.

In *Van Brunt v. Day*, 81 N. Y. 251, defendant, in the same instrument in which he assigned a mortgage to plaintiff, guaranteed absolutely to pay the mortgage in the event of failure to pay by the mortgagee. In an action upon the guaranty, *held*, that while proof of a contemporaneous parol agreement upon the part of plaintiff to keep the mortgaged premises insured for the protection of defendant was inadmissible to qualify or change the guaranty, the facts that at such time plaintiff, in consideration of being permitted to retain \$300 of the purchase-money of the

<sup>1</sup> *Weeks v. Medler*, 20 Kans. 57.

<sup>2</sup> *Riley v. N. Y. etc.*, R. Co. 34 Hun, 97.  
*Malpas v. London, etc.*, Ry. Co., L.  
 R. 1 C. P. 336.

<sup>3</sup> *Dodge v. Zimmer*, 110 N. Y. 43.

<sup>4</sup> *Riley v. N. Y., etc.*, R. Co. 34 Hun, 97.  
 To same effect: *Malpas v. London,*  
*etc.*, Ry. Co. L. R. 1 C. P. 336.

mortgage, and of the assignment to her by the defendant of a policy of insurance on the premises, agreed to keep such premises insured until the mortgage should become due, which she neglected to do; that the building on the premises was destroyed by fire, and that by reason of such neglect the security of the defendant was lost, might be shown to establish a counter-claim. "The parol agreement would not qualify or change defendant's undertaking; it would only give him, in case of breach, a right of action which might be set up as a counter-claim." Citing *Batterman v. Pierce*, 3 Hill, 171; *Hope v. Balen*, 58 N. Y. 380; *Lewis v. Seabury*, 74 id. 409.

29. In *Paul v. Owings*, 32 Md. 402, where a contract to purchase land was silent as to the manner and terms of payment, parol evidence was admitted to supply them; and in *Sire v. Rumbold*, 34 N. Y. St. Rep. 59, evidence was allowed to explain the character of "improvement" contemplated by a lease.

30. The case of *Kentucky, etc., Co. v. Cleveland*, Indiana appellate court, 30 N. E. Rep. 802, is an exceedingly nice one. The plaintiff complained for breach of an oral agreement of defendant to settle with him for the damages, and in consideration of a release therefrom to pay him \$1.50 per day during the time he should be disabled by an injury which was produced by the defendant's negligence, on the 21st of February, 1888; setting out a writing, signed by the plaintiff, dated March 17, 1888, by which, "for and in consideration of amount of money paid me while disabled by reason of an accident," etc., "and also in consideration of the doctor's fees while in attendance on me, I hereby waive all right to any and all claim for damages," etc.; alleging payment of the *per diem* allowance up to July 7, 1888, and non-payment after that date. There was a demurrer to the complaint, which was overruled, and judgment went for the plaintiff. A new trial was granted on another ground, but on this point the court observed: "It is maintained by counsel for appellant that the complaint is demurrable because it declares upon a parol agreement, and discloses that the final agreement of the parties was reduced to writing, thus merging all prior and contemporaneous parol arrangements; and it is further insisted that the writing shows no undischarged liability. It is true, where parties have gone to the pains of reducing a contract to writing, such writing, if complete on its face, will be held to be the sole repository of the ultimate intention of the parties upon the subject, and it can

not be modified or contradicted by parol. But where the writing is obviously incomplete, and does not of itself constitute an enforceable contract, it is not only proper but necessary to allege and prove extrinsic facts, in order to give it legal effect. A writing may form but part of an agreement, and when this fact appears from the instrument itself, the whole agreement, including both written and parol parts, should be alleged. *Freed v. Mills*, 120 Ind. 27. The instrument under consideration is incomplete, and affords appellee no enforceable rights without the aid of extrinsic facts giving it legal shape and application. It contains no executory duty on the part of the appellant which may be enforced in the absence of auxiliary provisions. It is unilateral in character, and in legal effect it is but a release from the damages consequent upon the injury, and to that extent it is valid. *Railroad Co. v. Welch*, 52 Ill. 183. Besides, the consideration of a written instrument may always be inquired into by parol evidence, and recitals respecting the amount and payment thereof may be contradicted, except to the extent that the consideration might render nugatory some other substantial provision of a valid contract." This decision can be supported only by practically reading into the release the words "and to be paid," after "money paid," and the words "and as long as 'disabled,'" after "disabled," and such a course would seem inconsistent with the unambiguous meaning of the word "paid, and in contradiction of an absolute release.

*Extension to sealed instruments:* This rule has been extended in some cases to sealed instruments.

*Illustrations:* 1. So where the sureties on a bond enter into a contemporaneous oral agreement by which one agrees to indemnify the other against loss, this does not contradict any of the terms of the bond, and may be proved by parol evidence. *Barry v. Ransom*, 12 N. Y. 462. Denio, J., said: "The engagements among themselves of the several parties who have become bound to another by a joint or joint and several contract, have no necessary place in the instrument, between them and such other contracting party. They are foreign to the purpose and object and purpose of the principal contract, and are not generally to be looked for among its stipulations. \* \* \* The form of the contract as between the obligors or promissors and the other contracting party does not prevent the introduction

of parol proof to determine the relations of such obligors or promissors as between themselves.<sup>1</sup>

2. In an action in a case for rent, parol evidence is admissible to show that the lessor agreed to perform and insert a certain covenant which was omitted. *Christ v. Diffenbach*, 1 S. & R. 464; S. C. 7 Am. Dec. 624. But in Pennsylvania such evidence is always admitted collaterally, whenever equity would reform or set aside the instrument for fraud or mistake. And so in *Hultz v. Wright*, 16 S. & R. 345; S. C. 16 Am. Dec. 575, parol evidence was admitted to show that it was the understanding of both parties to a lease that no rent should be payable for the last nine months. And in *Stultz v. Dickey*, 5 Binney, 285, proof was admitted of a custom to allow the tenant the away-going crop, although the lease gives no such right. And in *Raub v. Barbour*, 6 Mackey, 245, where a lease covenanted to give the lessee an option to purchase the premises, parol evidence was allowed to prove an oral agreement of the lessee to divide with the lessor any profit he might make if he should assign the lease. Citing *Lindley v. Lacey*, 17 C. B. (N. S.) 578; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erschine v. Adeane*, L. R. 8 Ch. App. 756; *Nickerson v. Saunders*, 36 Me. 413; *Fusting v. Sullivan*, 41 Md. 162. And in *Chester v. Bank of Kingston*, 16 N. Y. 336, an action on a bond, parol evidence was admitted to show that it was executed as collateral security, and that the principal debt had been paid.

3. The point was decided in *Blewitt v. Boorum*, N. Y. Superior Court, 14 N. Y. Supp. 298; 39 N. Y. St. Rep. 244, an action upon a contract by which the parties of the first part granted to the parties of the second part the full and exclusive right and license to manufacture, sell and use a certain invention covered by a patent issued to Russell during the term of the patent, and as consideration for such grant the parties of the second part (the defendants) agreed to manufacture the patented article, and to pay to each of the parties of the first part the sum of two and one-half cents on each binder as royalty. The agreement was executed by all the parties under their respective hands and seals, and it was actually delivered to the plaintiff. The answer admitted the making of the contract sued on, and alleged as a defense that it was agreed between the parties at the time of the making of the contract that the same

<sup>1</sup> To the same effect: *Blake v. Cole*, 22 Pick. 97.      *Taylor v. Savage*, 12 Mass. 98.

was to take effect as to the plaintiff only when he should have acquired a one-half interest in the patent by performance of a certain agreement that he (the plaintiff) had made with Russell, the other party of the first part to the contract in suit, whereby the plaintiff was to acquire from Russell a one-half interest in the patent; that the plaintiff never carried out such agreement with Russell, never acquired a half interest from Russell, and subsequently abandoned all attempt to obtain an interest in such patent, and relinquished and transferred to Russell all his right, title and interest under the contract. At the trial there was no controversy as to the actual delivery of the contract, or a copy of it, to the plaintiff, but evidence to prove the oral agreement between the parties, as above stated, and that the plaintiff had failed to acquire Russell's one-half interest, was admitted under objection, and judgment went for the defendant. Freedman, J., said: "These findings are fatal to plaintiff's case, if the evidence upon which they rest was admissible, and the only question presented therefore is whether or not it was error to receive such evidence. It is settled in this State that if a deed is delivered to a party or his authorized agent, and not to a stranger, it is absolute, and parol evidence of conditions qualifying the delivery is inadmissible. *Worrall v. Munn*, 5 N. Y. 229, and cases there cited. It is also settled that parol evidence is admissible to show that a written paper, not under seal, which in form is a complete contract of which there had been a manual tradition, was nevertheless not to become a binding contract until the performance of some condition resting in parol. *Reynolds v. Robinson*, 18 N. Y. St. Rep. 235; *Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390. It remains to be seen what the rule is as to an instrument under seal, which is not a deed, and does not relate to the transfer of the possession of land. Upon this point great confusion exists in the books. Formerly the tendency undoubtedly was to distinguish generally between sealed and unsealed instruments. Of late the tendency has been to disregard the distinction between sealed and unsealed instruments whenever it can be done without a violation of some settled principle of law. The precise point now under consideration has never been put at rest. \* \* \*

A review of all the cases to which our attention has been called upon this point would serve no useful purpose. Suffice it to say that a careful analysis of them with reference to the state of facts peculiar to each, shows that the confusion which does exist arises

not so much from the decisions as from *dicta* which are *obiter*, and that the strict enforcement of the rule which rejects parol evidence qualifying the delivery has been almost exclusively in cases of instruments under seal in which the delivery of the instrument constituted or involved a symbolic transfer of the possession of land. After due consideration of all that has been urged on both sides, I am of the opinion that the rule prohibiting parol evidence as to qualified or conditional delivery should be confined to the class of instruments last referred to, and that it should not be extended generally to all executory contracts under seal. If this view is sound the evidence in this case was properly admitted, and the exceptions taken by the plaintiff are untenable."

4. In *Bretto v. Levine*, — Minn. —; 52 N. W. Rep. 525, a deed of real estate, which embraced a store building provided with shelving, contained the clause: "This grant includes all the shelving in the building." *Held*, that parol proof of a sale of personal property at the same time was competent. The court said: "Although the agreement, assuming that it included the personal property, as well as the real estate, was entire in its nature, it related to subjects so different that different modes of carrying it into execution were appropriate, if not necessary. As to the personal property, all that was necessary to transfer the title was the agreement of sale and the payment of the price. The real estate could only be legally conveyed by deed. That was the ordinary and legally proper purpose of such an instrument. If the deed had not contained the clause above recited, there would be not much reason to support a claim that the deed of the real estate was intended by the parties to embrace, and become the exclusive evidence of, all which they might have agreed upon or intended to accomplish, so as to exclude oral evidence of a sale of the personal property as well as of the real estate. Such an instrument would not be legally presumed to have been intended to have a wider or different effect than that which, and which alone, such instruments are commonly and properly executed to accomplish—that is, to convey real property, and to express such conditions or covenants concerning the same as might be agreed upon. An instrument of such a nature would not be presumed to have been intended also to accomplish the very different purpose of evidencing all transactions or agreements of the parties relating to a subject distinct from that to which the deed in terms and appropriately relates. The deed upon its face,

and in view of the purposes for which such instruments are ordinarily and appropriately given, would have no such legal import, and would not be effectual to exclude oral proof of a contract relating to a collateral and distinct subject, such as the sale of personal property. *Healy v. Young*, 21 Minn. 389; *Jordan v. White*, 20 Minn. 91 (Gil. 77); *Green v. Batson*, 71 Wis. 54, and cases cited. But we do not think that the clause concerning the shelving in the building gave to this deed any other effect in this particular than it would have had if this clause had been omitted. If such a clause had been inserted with respect to one or more articles of personal property, as chairs, of such a nature that there could be no doubt as to whether they constituted a part of the realty so as to pass under a deed conveying the real property, the result would probably be different. But the most satisfactory conclusion, as to the reason for introducing this clause in the deed, is that it was because of some uncertainty or doubt as to whether the shelving was properly a part of the realty, or only personal property, and to prevent any controversy or question concerning that matter. By the technical language of the deed, the shelving was included as a part of the real property, 'this grant' being declared to include it. From this it is not to be conclusively presumed that the deed was not intended merely as a conveyance of what was deemed to be, or to belong to, the real estate, but also to be the repository of all that the parties had agreed upon or done, so as to exclude parol evidence of a sale of personal property as a part of the same transaction. The question considered in *Beaupre v. Dwyer*, 43 Minn. 485, was whether the description in the deed comprehended certain heavy machinery, so that the deed operated as a transfer of the title—a question entirely different from that here involved."

5. In *Willis v. Hulbert*, 117 Mass. 151, a deed provided that the grantees should pay the principal of a mortgage on the premises, and the grantor should pay the interest so long as he occupied the premises, and the grantee should pay the interest subsequently accruing. The grantee afterwards sued the grantor for use and occupation, and was allowed to prove an oral agreement made at the delivery of the deed, that the grantor might occupy until a day named, free of rent, on paying the interest to that day, but if he occupied longer he was to pay a fair rent.

6. In *Green v. Randall*, 51 Vt. 67, evidence was admitted to show on a sale of a farm and personal property, an oral agreement



to remove a mortgage on the land. Citing *Buzzell v. Willard*, 44 Vt. 44, the case of an oral agreement, on deeding a will, to put in a new wheel if the old one was not satisfactory. This was in assumpsit by the grantee for the expense of putting in a new wheel. The court said: "There was nothing in the deed on this subject to alter or change. The evidence was not offered to affect the deed as a conveyance, but to prove an independent agreement collaterally connected with the sale of the mill, as evidenced by the deed."

7. In *Dodge v. Zimmer*, 110 N. Y. 43, defendant transferred in writing all rights in her deceased husband's estate to the plaintiff, the administrator. The latter paid the defendant's attorney's costs and counsel fees in the matter, and in this action to recover them was permitted to show her oral agreement with the attorney to pay him, on the ground that it was a collateral matter.

8. In *Sire v. Rumbold*, N. Y. Com. Pleas. 14 N. Y. Supp. 925, a parol agreement for the reduction of the rent specified in a lease, until specified changes should be made in the premises, made at the execution of the lease, was held admissible. This was on the authority of *Chapin v. Dobson*.

9. So parol evidence was allowed to show that a mortgage conditioned for the payment of "any and all notes, checks and drafts indorsed" by the mortgage, was intended to secure future indorsements.<sup>1</sup>

*The contrary doctrine:* There are many decisions to the contrary.

1. Thus in *Reed v. Van Ostrand*, 1 Wend. 424; S. C. 19 Am. Dec. 529, evidence of a parol warranty on a sale of a chattel by a writing was said to be inadmissible. Savage, C. J., said: "Suppose one man sells to another a horse; he represents him as sound, gentle and useful; but a bill of sale is given in writing which contains a bare transfer of the animal, without any warranty or engagement as to the soundness or good qualities of the horse; could the purchaser in that case go back and prove the representations and assertions made before the execution of the bill of sale? I think not." But this was the case of a sealed assignment of a patent. To the same effect is *Smith v. Williams*, 1 Murphey, 426; S. C. 4 Am. Dec. 564, the case of a parol warranty of the soundness of a slave.

<sup>1</sup> *Farr v. Nichols*, 132 N. Y. 327; 30 N. E. Rep. 834.

2. So in *Mast v. Pearce*, 58 Iowa, 579; S. C. 43 Am. Rep. 125, it was held incompetent to show a parol warranty of chattels sold by a written contract, signed by both parties, containing no warranty. The court said: "In *Benjamin on Sales*, § 621, it is said: 'Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case or to extend it in the latter by inference or implication.' \* \* \* And in 1 *Parsons on Contracts*, 589, the author says: 'And where the contract of sale is in writing and contains no warranty then parol evidence is not admissible to add a warranty.' The learned authors cite a number of authorities in support of the rule. Such of these as we have examined fully sustain the proposition. Indeed, we feel quite sure no authority can be found holding a contrary doctrine. The rule rests upon the familiar principle that the writing is supposed to contain all the contract, and that it cannot be added to or varied by parol evidence. It will be understood that there is no fraud, accident or mistake averred in the answer in this case, and that the written contract amounts to a contract of sale. It is not an instrument merely intended as a receipt, or as an acknowledgment of the payment of the price or the like. It seems that in such cases parol evidence is not admissible to show a warranty. 1 *Pars. on Cont.* 589." The cases cited by Mr. Bennett in his note to *Benjamin on Sales*, § 621, generally support this decision. It should be observed however that the decision in *Rice v. Forsyth*, 41 Md. 389, was put on the ground that the evidence offered did not prove the warranty, and in *Mullain v. Thomas*, 43 Conn. 252, the written contract contained a warranty, and oral evidence was simply held incompetent to add to that, and so of *Shepherd v. Gilroy*, 46 Iowa, 193. The language of Mr. Benjamin quoted above is unquestionably in accordance with all the authorities as to the extension of an expressed warranty, but not so as to the addition of a warranty where none is expressed. Mr. Freeman also disapproves the *Chapin* case (note, 5 Am. St. Rep. 198), and it is sharply criticised by Mr. Jones (*Const. Com. and Trade Contracts*, § 142), as uttering unsound *dicta*, although he approves the decision of the point involved.

3. It is said, *obiter*, by Lamar, J., in *DeWitt v. Berry*, 134 U. S. 312, that "there is good authority for the proposition that if the contract of sale is in writing and contains no warranty, parol

evidence is not admissible to add a warranty." Citing *Reed v. Van Ostrand*, 1 Wend. 424; *Lamb v. Crafts*, 12 Metc. 353; *Dean v. Mason*, 4 Conn. 428; *Reed v. Wood*, 9 Vt. 285. This dictum is supported by the New York and Vermont cases cited, but not by the others, and the point of decision in the case was that an express warranty could not be varied by parol.

4. In *Osgood v. Davis*, 18 Me. 146; S. C. 36 Am. Dec. 708, it was held incompetent to add, by parol, a warranty of title to a written assignment on the back of a stock certificate. The court distinguished the case from one of a sale by a bill of parcels, and cited *O'Harra v. Hall*, 4 Dall. 340, where it was held incompetent to add a parol guaranty to a written assignment of a bond. So of an assignment of a mortgage. *Nally v. Long*, 71 Md. 585; S. C. 17 Am. St. Rep. 547. Parol evidence to add a warranty on a sale of personal property evidenced by writing, and to prove that the parties agreed that it should not be inserted in the writing, was held inadmissible in *Smith v. Dallas*, 35 Ind. 255, and so on a sale of book accounts, in *Robinson v. McNeill*, 51 Ill. 225, neither cases exhibiting much consideration of the point. The same was held in *Dean v. Mason*, 4 Conn. 428; S. C. 10 Am. Dec. 162, citing early New York cases.

5. To a sale note, describing the property and receipting the price, an oral warranty may not be added.<sup>1</sup> So of a contract for sale of a fishery and appliances.<sup>2</sup> So of an agreement to accept certain goods, specifying terms and mode of payment, and providing for freight.<sup>3</sup> When there was a seller's memorandum of sale of goods, describing kind, quantity and price, evidence of an oral warranty of quality was excluded.<sup>4</sup> To a bill of sale of a vessel an oral warranty that she is copper-bolted may not be added.<sup>5</sup> To printed conditions of an auction sale of growing timber an oral warranty of quantity by the auctioneer may not be added.<sup>6</sup> On a bill of sale of goods and good will of a store, evidence is inadmissible to show an oral agreement of the vendor not to engage in a similar business.<sup>7</sup> When there was a formal bill of sale of a business, stock, fixtures, appliances and certain leases, with covenant to warrant and defend, it was held that evidence of an oral engagement by the vendor not to resume the

<sup>1</sup> *Reed v. Wood*, 9 Vt. 285.

*Bond v. Clark*, 35 Vt. 577.

<sup>2</sup> *Etheridge v. Palin*, 72 N. C. 213.

<sup>3</sup> *Frost v. Blanchard*, 97 Mass. 155.

<sup>4</sup> *Harnor v. Groves*, 15 C. B. 667.

*Wetherill v. Neilson*, 20 Pa. St. 448.

<sup>5</sup> *Kain v. Old*, 2 B. & C. 627.

<sup>6</sup> *Powell v. Edmunds*, 12 East, 6.

<sup>7</sup> *Bassett v. Percival*, 5 Allen, 345.

same business, was inadmissible.<sup>1</sup> Where a charter-party was silent on the point, it was held that a prior memorandum was inadmissible to show that the vessel was to "proceed from the port where she now is to Baltimore without delay."<sup>2</sup> On a sale of the good will and fixtures of the business of a physician, and the seller's agreement not to practice medicine, for the expressed consideration of one hundred dollars, evidence may not be given of the buyer's oral agreement also to deed lands.<sup>3</sup>

6. In *Clenighan v. McFarland*, Common Pleas of New York city,<sup>4</sup> it was held that an oral agreement by a landlord, as a consideration of the hiring by the tenant, to put the premises in thorough repair before the commencement of the term, is collateral to the lease, and proof of it is not objectionable as modifying or varying the written lease. This was founded on *Chapin v. Dobson* and *Mann v. Nunn*, the court observing: "It is only such matters as concern a subject embraced in and covered by the terms of a lease that must be incorporated in it, although they may have been the subject of prior negotiation and agreement between the contracting parties." To the contrary is *Fondavila v. Jourgensen*, 52 N. Y. Super. 403. If there is an express covenant by the tenant to keep the premises in repair, there can be no collateral undertaking by the landlord to perform the covenant.<sup>5</sup>

7. In *First Free-Will Baptist Parish of Farmington v. Perham*, Supreme Court of Maine, 1892, an action to recover the defendant's subscription for building a meeting-house, he offered to prove that when he signed the paper it was the understanding on his part that another person should subscribe an equal amount, and that he should not be required in any event to pay any more than such other person. The court excluded the offered evidence, and also other offers of oral proof of what was said, or understood, at the time of signing the paper. *Held* correct.

## Sec. 51. Character of the additional matter.

The additional matter must be clearly collateral, and consistent with the written instrument.<sup>6</sup>

<sup>1</sup> *Costello v. Eddy*, 34 N. Y. St. Rep. 565; affirmed 128 N. Y. 650.

<sup>2</sup> *Renard v. Sampson*, 12 N. Y. 561.

<sup>3</sup> *Pickett v. Green*, 120 Ind. 584.

<sup>4</sup> 11 N. Y. Supp. 719.

<sup>5</sup> *Ramsay v. Wilkie*, N. Y. Com. Pl. 13 N. Y. Supp. 554.

*Lockrow v. Horgan*, 58 N. Y. 635.

<sup>6</sup> *Boyle v. Agawam Canal Co.* 22 Pick. 381; S. C. 33 Am. Dec. 749.

*Smith v. Deere*, — Kans. —, 29 Pac. Rep. 603.

*Taylor v. Davis*, — Wis. —, 52 N. W. Rep. 756.

1. Upon this ground it was early held that a bill of sale may not be shown to be a mere mortgage. *Thompson v. Patton*, 5 Litt. 74; S. C. 15 Am. Dec. 44. *Bryant v. Crosby*, 36 Me. 562; S. C. 58 Am. Dec. 767.

2. So in *Wemple v. Knopf*, 15 Minn. 440; S. C. 2 Am. Rep. 147, an action for goods sold and delivered, the plaintiff gave in evidence a written order for the goods, signed by the defendant, and proved that they were delivered according to the terms of such order. The defendant thereupon offered to prove that at the time said order was made, as an inducement thereto, plaintiff verbally agreed with defendant that the latter might revoke the order during the summer and not take the goods, and that during the summer and before the delivery of the goods he did revoke said order. *Held*, that such offer was properly rejected.

3. So in *Gordon v. Niemann*, 118 N. Y. 152, plaintiff and defendants entered into a written contract whereby defendants agreed to sell her such patterns as she should order, and that they should take back from plaintiff all old and undesirable patterns, and give in exchange such other patterns as were ordered when the old ones were returned; such contract to continue for one year, with the right of transfer. At the end of the year, plaintiff, desiring to discontinue the business, asked defendants to take back all unsold patterns, of the value of \$488, and refund the money paid therefor. Upon defendants' refusal to do so, she brought action for the value of the patterns remaining unsold. *Held*, that she could not be allowed to show, in support of the action, that an independent oral agreement was entered into whereby defendants agreed to relieve her of the agency for the patterns, should she so desire, and transfer the same, taking back all unsold patterns at the end of the time, and returning the money paid for the same.

4. In *Read v. Bank of Attica*, 124 N. Y. 671, it was held that where a certificate of deposit contains no stipulation as to interest, parol evidence is not admissible to prove that when it issued the certificate the bank agreed that it should bear interest. It was said in *Hotchkiss v. Mosher*, 48 N. Y. 478, that a certificate of deposit is a mere receipt, open to parol explanation, and so that it was competent to prove that such a certificate was really a receipt for money on payment of notes; but in *Pardee v. Fish*, 60 N. Y. 269, this was pronounced *obiter* and disapproved. In *Baer's Appeal*, 127 Pa. St. 360, it was held that a certificate of

deposit payable one year from date may not be varied by evidence of an oral contemporaneous agreement that the money might be withdrawn at any time, in the absence of fraud, accident or mistake.

5. In *Engelhorn v. Reitlinger*, 122 N. Y. 76, it was held that in an action by the seller against the purchaser for the breach of a written contract, in which all the terms of the sale are explicitly set out, to buy fifteen thousand ounces of quinine, parol evidence is inadmissible to show that the sale was made on condition that the seller would advance the price of quinine after the sale, and announce the fact by circular to the trade. The court said: "In an action by a promisee, a promisor may show a failure of a consideration for the promise sued upon (*Eastman v. Shaw*, 65 N. Y. 522), or that the contract was destined to take effect only on the happening of some future event, and upon condition that it was to be binding only upon performance of a condition precedent resting in parol (*Benton v. Martin*, 52 N. Y. 570-574; *Juilliard v. Chaffee*, 92 id. 535; *Reynolds v. Robinson*, 110 id. 654), or that the instrument sued upon was executed in part performance only of an entire oral agreement (*Chapin v. Dobson*, 78 N. Y. 74; *Brigg v. Hilton*, 99 id. 517; *Routledge v. Worthington Co.* 119 id. 592), and it has no application to collateral undertakings. *Lindley v. Lacey*, 17 C. B. (N. S.) 578; *Jeffery v. Walton*, 1 Starkie, 213; *Batterman v. Pierce*, 3 Hill, 171; *Ers- kine v. Adeane*, L. R. 8 Ch. 756; *Morgan v. Griffith*, L. R. 6 Exch. 70. The subject has been so fully considered in recent cases in this court that any discussion of the reason or policy of the rule and its exceptions is now unnecessary. See in addition to the cases cited, *Johnson v. Oppenheim*, 55 N. Y. 280; *Wilson v. Deen*, 74 id. 531; *Eighmie v. Taylor*, 98 id. 288; *Snowden v. Guion*, 101 id. 458; *Schmittler v. Simon*, 114 id. 176."

6. In *Tracy v. Union Iron Works*, 104 Mo. 193, where parties had entered into a written lease of premises "in the present condition thereof," a prior oral agreement, by which the lessor, after the lease began, was to add a switch to connect the premises with a railway line, was held inadmissible in evidence. So in an action against two on a breach of warranty of the soundness of a slave, parol evidence was held inadmissible to show that the sale was made by both, the bill of sale reciting a sale by only one.<sup>1</sup>

<sup>1</sup> *Wren v. Wardlaw, Minor*, 363; S. C. 12 Am. Dec. 90.

7. As examples of agreements conclusively deemed to show the entire contract on their face, and not to be explainable by parol are several recent New York cases: In *Marsh v. McNair*, 99 N. Y. 174, the instrument read: "This is to certify that in consideration of crediting C. H. at the Exchange Bank of Lima \$353.72, paying mortgage on property formerly deeded by J. R. Marsh, in Avon, to C. W. Gibson, given by William F. Russell to C. H. Marsh, \$110.46, and indorsing \$35.82 upon a note made by C. H. Marsh, June 8, 1871, for \$300, we jointly and severally sell, assign and transfer all our right, title and interest in two policies," (describing certain life insurance policies), "to Chauncey W. Gibson, of Lima, N. Y." Parol evidence that it was executed as collateral security was excluded. This was on the ground that it was "more than an assignment," and "contains what both parties agreed to do." In *Thomas v. Scutt*, 127 N. Y. 133, the instrument purported to "sell, assign, transfer and deliver" a raft of lumber, covered by a chattel mortgage of which a copy was annexed, the assignment stating the kinds, amounts, separate prices, and the aggregate price, "the same to apply on the amount due on said chattel mortgage, and if any mistake in amount of lumber, same to be corrected." Parol evidence that it was not an absolute sale, and that the assignor was to have the net proceeds of the sale of the lumber, and that it was executed because the lumber was in another state, and the mortgage did not protect against a levy on or a disposition of it there, was excluded. In *Costello v. Eddy*, 128 N. Y. 650, on a sale by defendant to plaintiff of a bakery business at S., a written contract and bill of sale were executed, which described the property sold as "the leases and business carried on by said [defendant] as a bakery business" in S. It did not in terms convey the good-will of defendant, nor contain any express agreement that defendant would not again engage in such business at S. *Held*, that plaintiff could not, on parol evidence of an agreement by defendant, during the negotiations, not to carry on the business of a baker at S., recover damages from him for breach of such alleged agreement.

8. It is incompetent to show as a condition of a chattel mortgage, an oral agreement that the mortgagee would furnish the mortgagor with money to establish himself in business.<sup>1</sup>

9. In *Groot v. Story*, 44 Vt. 200, the writing read: "Due H. G. \$295 in part payment for a piano, to be selected by G."

<sup>1</sup> *Moore v. Prentiss Tool, etc. Co.* 133 N. Y. 144.

Evidence was offered that the real consideration was that the defendant received from the plaintiff an old piano, which he had sold him, in part payment for a new one, to be selected by the plaintiff, and to cost not less than \$500, in which case defendant would receive a commission of at least thirty per cent. This was rejected, Redfield, J., dissenting.

10. In *White v. Richmond R. Co.* 110 N. C. 456, the plaintiff, a conductor, injured in the defendant's employ, executed, in consideration of \$6,000, a release of his claim of damages therefor. His offer to show that it was a part of the consideration that the defendant should employ him for life was rejected. The court said: "It would be singular, indeed, not to mention so unusual and important a part of the consideration as that which the plaintiff contends was omitted by mere mistake. In the nature of the matter it was appropriate and orderly to specify the whole consideration. The language employed was appropriate and apt for that purpose, and in the absence of any provision or implication in the release to the contrary, it must be taken that it does. It by its terms and effect concludes the plaintiff, and he cannot be allowed to allege that there was other and further consideration for it than is therein expressed."

11. So where there was a written contract for the sale of goods, evidence to show that it was by sample, and to show that the goods delivered were inferior to the sample, was excluded.<sup>1</sup> So where there is a bill of sale containing a description of the property, acknowledging the receipt of the price and warranting the title, a warranty of soundness may not be added by parol.<sup>2</sup> Parol evidence was refused to add to a deed of a patent an oral warranty that the machines patented would work well.<sup>3</sup> And when an insurance policy exempted the company from liability for injury to goods "by a sea," parol evidence was held inadmissible to limit it to shipments on deck.<sup>4</sup> So where the plaintiff was to sink iron piles for defendant and put girders thereon, and "put all iron in place in thirty days after sufficient iron has been delivered, and provided that the iron is delivered in regular order and quantity, and that the floor is laid as fast as required for the erection of the iron," parol evidence to show defendant's agreement to lay the floor as fast as required for the erection of the

<sup>1</sup> *Harrison v. McCormick*, 89 Cal. 327;

S. C. 23 Am. St. Rep. 469.

<sup>2</sup> *Galpin v. Atwater*, 29 Conn. 93.

<sup>4</sup> *Snowden v. Guion*, 101 N. Y. 458.

<sup>3</sup> *Rodgers v. Perrault*, 41 Kans. 385.



iron was excluded.<sup>1</sup> So a subscription payable in cash may not be shown by parol to be payable in labor.<sup>2</sup>

12. H. contracted to sell "all the hay belonging to him." Evidence of a contemporaneous oral promise that it should come up to certain marks in the barn, and be enough to keep plaintiff's cows until the pasturage season began, was excluded. "Evidence that he agreed to sell more than the amount stated in the agreement could not be collateral," said the court.<sup>3</sup>

13. In *Nat. Cash Register Co. v. Blumenthal*, 85 Mich. 464, a written order described the machine ordered, provided the mode of payments and for repairs, that title should not pass until payment was fully made, and concluded: "This contract covers all agreements between the parties hereto." It was held improper to show a contemporaneous agreement that the defendant was to have the machine "five days on trial." The court *obiter* criticized *Chapin v. Dobson* as going "beyond any authorities cited to support it."

14. In *Willard v. Ostrander*, 46 Kans. 591, where there was a bill of sale of sheep, evidence to show a contemporaneous oral warranty was excluded on the authority of *Reed v. Van Ostrand* and *Mississippi* cases.

15. Where there was a written warranty of a machine, on a sale, an additional oral warranty is not provable.<sup>4</sup> When a written agreement to purchase stock mentions no time for performance, the law implies that it is to be performed within a reasonable time, and extrinsic testimony is not admissible to rebut this implication.<sup>5</sup> Where a written agreement for the sale of an interest in an hotel, and the joint operation of the hotel, provides, without ambiguity, for the payment of a certain sum in a certain time for the interest so sold, it is not competent to show by parol that it was understood the payment was to be made out of the profits of the business, or in any other mannner not specified in the writing.<sup>6</sup> In an insurance on a cargo, where the owner had by the policy a choice of routes, evidence is incompetent to show that he orally agreed to take a certain route.<sup>7</sup> The written agreement to pay insurance premiums at a certain time may not be varied by proof

<sup>1</sup> *Case v. Phoenix Bridge Co.* 11 N. Y. Supp. 724.

<sup>2</sup> *Stewards v. Town*, 49 Vt. 29.

<sup>3</sup> *McVean v. Squires*, N. Y. Supr. Ct. 17 Week. Dig. 206.

<sup>4</sup> *Shepherd v. Gilroy*, 46 Iowa, 193.

<sup>5</sup> *Boehm v. Lies*, N. Y. Super. Ct. 18 N. Y. Supp. 577.

<sup>6</sup> *Smith v. Kemp*, — Mich. —; 52 N. W. Rep. 639.

<sup>7</sup> *White v. Ashton*, 51 N. Y. 280.

of an oral agreement of the company not to require payment until notice.<sup>1</sup>

16. Where parties exchanged memoranda of sale of a vessel, naming price, time for payment, "full packages of beef, etc., to be taken out by the owners, all other small stores belonging to the vessel," proof of a prior oral warranty that the vessel was of white oak was excluded.<sup>2</sup> This was put on the ground that the writing constituted a complete contract of sale. When the contract was to "furnish and set up machinery for a one-hundred-barrel mill," specifically describing it, evidence is not admissible of a warranty that it would manufacture three designated grades of flour.<sup>3</sup> Where there was a memorandum that "we have this day bought of L. Bros. seventy bales of hops," stating the price, evidence was excluded that the buyer said to the seller's agent, on signing, that he signed on condition that "when I return from Canada, and find that it was not the market price, it will be no sale."<sup>4</sup> So when there was a written contract for service as foreman, at "a salary of £2 per week, and house to live in from the 19th of April, 1871," it was held that parol evidence of a contemporaneous conversation tending to show that the hiring was for a year was inadmissible.<sup>5</sup>

17. In *Hutton v. Maines*, 68 Iowa, 650, defendant signed a contract for the purchase of lightning rods at a price stipulated in the contract. He was induced to sign this upon the representation that it was to be used as an advertisement only, having made a parol agreement for the purchase on very different terms from those recited in the contract. *Held*, that parol evidence was not admissible to vary the contract. The court said: "It is proper to say here that there is no claim that defendant was in any manner deceived or misled as to the contents of the instrument which he signed. By its terms the instrument is an express agreement by defendant to buy the rods and points, and to pay forty cents per foot for the latter, and he knew when he signed it that it contained these provisions, and he admits that it expresses the real contract which the parties entered into in every particular, except as to the price which he was to pay for the property.

<sup>1</sup> Insurance Co. v. Mowry, 96 U. S. 544.

<sup>2</sup> Randall v. Rhodes, 1 Curt. C. C. 90.

<sup>3</sup> Conant v. Nat. State Bank, 121 Ind. 323.

"The provisions of the contract are

specific, and these specific provisions cannot be supplanted by oral statements."

<sup>4</sup> Lillenthal v. Suffolk Brewing Co., 154 Mass. 185; 28 N. E. Rep. 151.

<sup>5</sup> Evans v. Roe, L. R. 7 C. P. 138.

His proposition now is to prove by parol that the instrument was signed and delivered for a purpose entirely different from that expressed in it; that while by its terms it appears to be a contract between the parties with reference to the subject about which they actually contracted, it was not intended by them as the evidence of their agreement. We think it entirely clear that this cannot be done. The parties having deliberately declared in the instrument that it was executed for one purpose, cannot be permitted to show by parol that it was executed for an entirely different object, and defendant having deliberately agreed in writing to pay the prices named for the property, cannot be permitted to prove by parol that his undertaking was different. The rule which forbids this is elementary, and we need not cite authorities sustaining it. It may be that defendant was induced by misrepresentations of plaintiff's agent to bind himself to pay a greater price for the property than he intended to pay; but he signed and delivered the instrument with knowledge of its contents. Whatever of hardship there is in the case is the result of his own indiscretion, and the courts cannot set aside the settled rules of the law to protect men from the consequences of their folly."

18. An oral extension of the time for performance of a contract to convey land may not be shown.<sup>1</sup> An oral condition that an order shall "be no sale" if the market price proves not to be as represented by the seller, is a condition subsequent and not precedent, and may not be proved to affect the terms of an unconditional written order.<sup>2</sup>

19. Where a chattel mortgage secured several notes maturing at different times, parol evidence was held inadmissible to show a contemporaneous agreement of the parties that a note maturing later than others was first to be paid.<sup>3</sup>

*Rule as to leases:* On a lease containing no warranty of fitness, the declarations of the lessor to that effect cannot be proved by parol. *Dutton v. Gerrish*, 9 Cush. 89; S. C. 55 Am. Dec. 45. Shaw, C. J., said: "If there was any warranty, express or implied, it was a part of the contract of hiring, and not something separate and independent, and must therefore be found as one of the items or terms of that contract." So evidence may not be given

<sup>1</sup> *Atlee v. Bartholomew*, 69 Wis. 43; S. C. 5 Am. St. Rep. 103.

<sup>3</sup> *Schultz v. Plankinton Bank*, — Ill., 30 N. E. Rep. 346.

<sup>2</sup> *Lillienthal v. Suffolk Brewing Co.*, 154 Mass. 185.

of a prior oral agreement to introduce gas and water upon the premises. *McLean v. Nicol*, 43 Minn. 169. So of evidence of a guaranty that an engine and boiler on the premises were in thorough repair. *Naumberg v. Young*, 44 N. J. L. 331; S. C. 43 Am. Rep. 380. This case contains an extremely learned examination of the authorities, and disapproves of *Morgan v. Griffith*, *Erskine v. Adeane*, and *Mann v. Nunn*. The court said :

“ The general rule that parol evidence will not be received to add to or alter the terms of a contract in writing, applies to leases as well as other instruments in writing. Except where fraud or illegality has been set up, parol evidence of an agreement not expressed in the writing is competent only where the writing contains only a part of the contract, or the evidence is admitted to apply the written contract to its subject matter, or to establish a parol contemporaneous agreement between the parties, with respect to the manner in which the rent reserved should be paid, which both parties have acted upon and carried into execution, and therefore have given the agreement the force and effect of an accord executed. *Oliver v. Phelps, Spencer*, 180; S. C. 1 Zab. 597, is an example of the latter class of cases.

“ There is a class of cases where the parties concluding an agreement, which is reduced to writing, have at the same time and on the same consideration, negotiated by parol another agreement which is collateral and on a subject distinct from that to which the written contract relates, in which oral evidence of such an agreement is held to be competent. *Lindley v. Lacey*, 17 C. B. (N. S.) 578, is a case of this class. The parties were negotiating for the sale and purchase of the fixtures and good will of a business, and their agreement on that subject was reduced to writing. At the same time a promise was made by the defendant in consideration of the plaintiff's signing the agreement, that he, the defendant, would settle an action then pending against the plaintiff at the suit of one C. The defendant neglected to settle the suit, and the goods were seized and sold under the judgment recovered therein. In an action for damages for this default, evidence of the prior oral agreement to settle the action was held admissible, notwithstanding the written agreement authorized the defendant to settle C.'s action out of the purchase money. This ruling was made on the ground that the defendant's promise to settle C.'s claim against the plaintiff and thus stay the action against him, was a thing which was totally collat-

eral and distinct from the agreement for the sale of the goods and the transfer for the possession of the premises—a preliminary matter to be done at once.

“Another class of cases in which oral testimony of an agreement by the parties is held to be competent, are those in which the evidence is offered to show that the written agreement was made to take effect upon a condition which was not performed. *Pym v. Campbell*, 6 E. & B. 370, and *Wallis v. Littell*, 11 C. B. (N. S.) 369, are cases of this class. In the first of these cases the action was for the non-performance of an agreement to sell. The plaintiff produced the written agreement, signed by the defendant. The defendant was allowed to prove by oral testimony, that the agreement was drawn up and signed with the understanding that it should be no bargain until approved by A., and that A. did not approve of it. In the second of these cases the plaintiff declared on an agreement in writing by the defendant to transfer to him a farm the latter held under Lord S., upon the terms and conditions under which the same was held by the defendant under Lord S. In an action for refusing to transfer the farm, the defendant was allowed to prove, by parol, that the agreement was subject to the condition that it should be null and void if Lord S. should not, within a reasonable time consent and agree to the transfer of the farm to the plaintiff. In cases of this class the oral testimony is received, not with a view to add an additional term to the written agreement in defeasance of it, but for the purpose of showing that the latter did not become an agreement at all.

“Three recent English cases have carried the doctrine of the admissibility of parol evidence where there is a written agreement between the parties, to an extreme length. *Morgan v. Griffith*, L. R. 6 Exch. 70; *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Mann v. Nunn*, 43 L. J., C. P. (N. S.) 241.

“*Morgan v. Griffith* and *Erskine v. Adeane* are almost identical in their facts. A farmer in treaty for grass lands declined to take them, on the ground that the property was overrun with rabbits. The lease, as prepared in writing, reserved to the lessor the right to kill game. The lessee refused to execute it until the lessor promised to kill down the game. The rabbits not having been destroyed, the tenant sued the landlord for the damage done by them to the grass and crops; and evidence by parol of the landlord's undertaking to keep down the game was admitted. •

“Morgan v. Griffith was decided upon little consideration. The ground of decision was that the verbal agreement was collateral to the lease, and did not affect the mode of enjoyment of the land demised. Erskine v. Adeane was decided by two equity judges on the authority of Morgan v. Griffith, reversing the decision of Lord Romilly, M. R., who had excluded the evidence, for the reason that the alleged agreement was not a distinct agreement, but an alteration of the original terms of agreement, and to be binding, should have been inserted in the lease. Morgan v. Griffith was approved in Angell v. Duke, L. R., 10 Q. B. 174; but it is apparent from the report of the latter case that the approbation expressed had reference only to the fact that such an agreement was not within the statute of frauds; for Angell v. Duke, on that occasion, was argued on demurrer, and the only point of demurrer was that the agreement in question was for an interest in lands within the statute of frauds; and it appearing on the face of the pleading that the landlord’s agreement sued on—to put the house in repair and send more furniture into it—was antecedent to and collateral to the contract of letting, the declaration was sustained. But at the trial oral testimony was tendered of the alleged promise in the course of a treaty for the lease, and the lease containing a demise of the house and the furniture in it, comprised in a schedule annexed, Blackburn, J., rejected the testimony and held that the lease was conclusive as to all that referred to the taking of the house and furniture, and his ruling was sustained by the court *in banc*. Angell v. Duke, 32 L. T. Rep. (N. S.) 320; 23 W. Rep. 548.

“In Mann v. Nunn the defendant let a messuage in an unfinished state, by a written agreement. Before and at the time of signing the agreement he verbally promised to put the premises in a condition fit for habitation—mentioning, among other things, a new water-closet. He failed to put in the closet, and oral testimony of his promise was held to be competent in an action by the tenant for damages. The landlord’s promise possibly may be considered to relate to what Chief Justice Erle, in Lindley v. Lacey, calls a preliminary matter to be done at once, before the lease should take effect. Mann v. Nunn was doubted by Blackburn, J., in Angell v. Duke, 32 L. T. Rep. (N. S.) 320, and, the landlord’s promise be regarded as in the nature of a covenant to repair, is contrary to that line of cases which hold that such an

undertaking cannot be established by parol if the premises are let by a lease in writing.

“Undoubtedly this rule of evidence presupposes that the parties intended to have the terms of their agreement embraced in the written contract. If it was designed that the written contract should contain only a portion of the terms mutually agreed upon, and that the rest should remain in parol, the parties have not put themselves under the protection of the rule. But in what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? The question is one for the court, for it relates to the admission or rejection of evidence. It cannot be assumed that the written contract was designed as an imperfect expression of the parties' agreement, from the mere fact that the written agreement contains nothing on the subject to which the parol evidence is directed. On that assumption, that part of the rule which excludes parol proof, as a means of adding to the written contract, would be entirely abrogated. And to permit the parties to lay the foundation for such parol evidence by oral testimony that they agreed that that part only of their contract should be included in the written agreement, would open the door to the very evil against which the rule was designed to protect.

“The only safe criterion of the completeness of a written contract as a full expression of the terms of a party's agreement is the contract itself. When parties have deliberately put their mutual engagements into writing in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of the completion of the contract, will be rejected. 2 Taylor Ev. § 1035. If the written contracts purport to contain the whole agreement and it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible. *Hei v. Heller*, 53 Wis. 415. ‘If the instrument,’ says Chief Justice Erle, in *Lindley v. Lacey*, ‘shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence shall be admitted to introduce a term which does not appear there.’ In *Crane v. Elizabeth Library Association*, 5 Dutch. 305, Chief Justice Whelpley said: ‘Where the

parties have, by a written paper purporting to be complete on its face—that is, to be a full agreement—undertaken to define the whole nature and extent of their agreement, parol evidence ought not to be admitted to add a single stipulation or vary the legal effect of those contained in it.’ He adds: ‘Where an entire verbal contract has been entered into, and in part execution of its terms, written papers have been signed by either of the parties, which on their faces are fragmentary and do not purport to be an entire and complete contract, the parol contract is not held to be merged in them, but may, notwithstanding their existence, still be proved.’ In *Powell v. Edmunds*, 12 East, 6, a sale of growing timber was made by auction, on printed conditions of sale which did not state anything as to the quantity. Parol evidence was offered that the auctioneer at the time of the sale warranted the quantity. The rejection of the testimony was sustained by the court, Lord Ellenborough saying: ‘If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement, which would be setting aside all written contracts and rendering them of no effect.’ The observations above quoted apply specially to *Morgan v. Griffith* and *Erschine v. Adeane*. In every instance the object of a written lease is to express the mutual undertakings of the landlord and his tenant relating to the preservation and improvement of the premises for the benefit of the landlord and the advantageous enjoyment of them by the tenant. It is undeniable that in both those cases the alleged promise of the landlord was an agreement to do acts upon the demised premises which would make their occupation and cultivation more profitable to the tenant, as much so as the landlord’s promise to make substantial repairs, or to contribute labor toward their cultivation. It added a new term to the terms of letting contained in the written lease. When the contract is reduced to writing the law presumes that the writing contains the whole agreement. To permit terms to be engrafted upon the written agreement by mere parol evidence, would be attended with all the danger, laxity and inconvenience which the general rule is calculated to exclude; for an agreement might, by such additional terms, be as effectually altered as if the very terms of the agreement had been changed by parol evidence. 3 Starkie Ev. 1007; *Speckels v. Sax*, 1 E. D. Smith, 253.

“Nor can this salutary rule of evidence, which is indispensable



to the security of contracting parties, be maintained in its integrity in the admission of oral testimony in relation to matters which, in a general sense, might be considered as collateral to the contract. An exception of such a compass would, in a great variety of cases, entirely displace the rule and make it of little value. For instance, in contracts of letting, the usual covenants—such as for repairs and improvements, the payment of taxes, rates, assessments and insurance, the mode of cultivation or occupation, and the like—are all collateral to the demise of the land; and if oral testimony be received to prove the agreements of the landlord or tenant on such subject, the written lease would be of little avail. To justify the admission of a parol promise by one of the contracting parties to a written contract, on the ground that the promise was collateral, the promise must not only be collateral but must, as in *Lindley v. Lacey*, relate to a subject distinct from that to which the written contract applies.

“I think it may be considered as settled upon principle, as well as by the weight of authority, that where the written contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and that oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction, with respect to which the parties are contracting as to be part and parcel of the transaction itself, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract. Thus a covenant by the landlord to repair is in itself collateral to the demise of the premises; and yet a contemporaneous promise by the landlord to make repairs cannot be established by parol evidence where there is a lease in writing. *Howard v. Thomas*, 12 Ohio St. 201; *Cleves v. Willoughby*, 7 Hill, 83. Where an agreement specifies only the rent and the term, but is silent as to repairs, it is obvious that such an agreement may be as completely varied by proof of an additional stipulation that the landlord shall lay out a specific sum in alterations, as by evidence that the rent shall be diminished without any stipulations as to repairs. 3. *Starkie Ev.* 1007. The reason for this course of decision is accurately given by Gholson, J., in *Howard v. Thomas*. He says, that ‘while the written agreement may be considered as silent on the subject of the improvement which it is alleged the landlord agreed to make, yet the making of such an improvement is to be

regarded as a part of the transaction by presumption of law, and cannot be separated from it, or regarded as a distinct transaction. Any negotiation therefore in relation to such an improvement is concluded by the written agreement.' " \* \* \* "On an agreement in writing for the sale of a fish-stand, which contained nothing relative to the good-will of the business, it was held incompetent to prove that at the time of the sale a verbal contract was made that the vendor should not engage in the fish business for a year. *Wilson v. Sherburne*, 6 Cush. 68. In a later case, the same court held, that on a written agreement to sell a stock of goods at the market price, and to lease the store for five years at the understood rent, parol evidence was inadmissible to show that the agreement was executed only as a memorandum and partial statement of the contract, and that another independent oral agreement was made at the same time and upon the same consideration that the vendor should not engage in similar business in the same place within five years. *Doyle v. Dixon*, 12 Allen, 576. The case last cited was again before the court, and the purchaser was allowed to recover on such an agreement made subsequent to the written agreement, and based upon a new and independent consideration. *Doyle v. Dixon*, 97 Mass. 208.

"A warranty of the quality of property is collateral to the sale, for the title will pass without such a warranty; but when such an undertaking is entered into, it will form part of the contract by the agreement of the parties. *Benj. on Sales*, 452. Hence when the contract of sale has been reduced to writing, parol evidence is inadmissible to add a contract of warranty to the terms of the contract as expressed in the writing. *Kain v. Old*, 2 B. & C. 627; *Powell v. Edmunds*, 12 East, 6; *Harnor v. Groves*, 15 C. B. 667; *Mumford v. McPherson*, 1 Johns. 414; 3 Am. Dec. 339; *Reed v. Van Ostrand*, 1 Wend. 424; *Benj. on Sales*, 461; *Story on Sales*, § 358 *a*. Oral testimony of a warranty is competent only where, as in *Allen v. Pink*, 4 M. & W. 140, and in *Chapin v. Dobson*, 78 N. Y. 74; S. C. 34 Am. Rep. 512, the writing is informal, and does not on its face purport to contain the entire contract of the parties. In the present case the lease is perfect and complete in all its parts. On its face it purports to express the terms of the letting as finally agreed upon. The effort is to engraft, by parol evidence, a contract of warranty upon a contract in writing, which appears to be complete and perfect, and is silent on that subject. Oral testimony cannot be admitted for this pur-

pose without breaking down the rule which permits parties to make their written contracts the only evidence of their undertakings, and enables them to protect themselves from the hazard of uncertain oral testimony with respect to their engagements. Where the lease contains no warranty of the condition of the premises, declarations of the lessor on that subject are not admissible to create a warranty; such proof would be adding to the written agreement by parol evidence. *Dutton v. Gerrish*, *supra*, and *Brigham v. Rogers*, 17 Mass. 571, are directly in point. In the first of these cases parol evidence of a warranty of the condition of the premises demised—there being a written lease—was excluded; and in the second it was held, that where an estate was demised by lease under seal, no action lay on a parol promise made by the lessor at the time of executing the lease, that the water on the premises demised would be good, and that there would be enough of it, and if not he would make it so." Followed, *Van Horn v. Van Horn*, 23 Atl. Rep. 1079.

2. In *Eighmie v. Taylor*, 98 N. Y. 288, the instruments in question were an assignment of a lease of oil lands, and an assignment and guaranty of a mortgage in payment therefor. The assignee assumed all the conditions of the lease and all debts and liabilities arising therefrom, and the assignor conveyed the "lease, business and fixtures." It was held that the writings constituted a contract complete on its face, and that evidence was improperly received of an oral warranty as to the present production of the wells, its value, the character of the machinery and the amount of the debts. *Chapin v. Dobson* was distinguished, and so were *Erskine v. Adeane* and *Morgan v. Griffith*, on the ground that the warranty in those cases was not as to the contemporaneous state of things, but as to what should be the future conditions, and therefore collateral. Finch, J., in the opinion, also says of *Chapin v. Dobson*: "If the case be near the border line in the application of the exception to the facts, there can be no question of the soundness of the doctrine asserted."

3. The general rule excluding parol evidence of additional and contradictory stipulations in a lease was learnedly expounded in *Tracy v. Union Iron Works Co.* 104 Mo. 193, where parties entered into a written lease of premises "in the present condition thereof," and a prior verbal agreement, by which the lessor, after the lease began, was to add a switch to connect the premises with a railway line, was *held* not admissible in evidence. The court said :

“It is not denied that verbal evidence in contradiction of written, and especially of sealed, documents is usually inadmissible; but the case here is said to belong to a recognized class of exceptions to that rule. Waiving all questions that might arise from the form of the lease as a specialty, and treating it merely as a written contract, let us examine the merits of defendant's contention. The general rule excluding evidence of contemporaneous or prior verbal agreements, varying or contradicting the terms of a valid written instrument, is the outgrowth of the common experience of men. It is of great antiquity, and appears in other systems of jurisprudence besides our own. Corp. Jur. Civ. Cod., lib. 4, tit. 20, I; Tait Ev., pp. 326, 327. It rests on principles somewhat analogous to those which underlie the doctrine of the conclusiveness of judgments upon parties thereto. It is said to be the interest of the State that there should be an end to litigation. Accordingly the record that closes a forensic controversy is regarded as merging the matters litigated to the extent declared in the judgment. So in private adjustments of reciprocal rights, it is wisely considered that when parties have deliberately put their mutual agreements into the form of a completed written contract, that expression of their intention should be accepted as a finality, in which is merged all prior negotiations within the scope of the writing. But the rule has too long occupied a place as a corner-stone in the law of evidence to require at this day any justification of its existence. We may however properly remark that the adoption of the modern practice, admitting as witnesses the parties directly interested in the action, seems to add a cogent reason to those existing in the common law for a close adherence to the rule under discussion. If the uncertainty of ‘slippery memory’ furnished a ground for excluding such verbal testimony in the days of Lord Coke (*Countess of Rutland v. Earl of Rutland*, 1604, 3 Coke pt. 5, p. 26 a), how much stronger reason for such exclusion to-day, when the influence of self-interest is so likely to render the memory of litigating parties more ‘slippery’ than was that of the witnesses of olden time. In Missouri the general rule has been repeatedly approved in early as well as recent decisions. *Woodward v. McGaugh*, 1843, 8 Mo. 161; *Walker v. Engler*, 1860, 30 id. 130; *State v. Hoshaw*, 1889, 98 id. 358; *Morgan v. Porter*, 1891, 103 id. 135. There are however cases here and elsewhere announcing propositions called exceptions to this rule. Some may fairly be so described, as for

example, those admitting parol evidence to contradict a recited consideration or to show that in equity an absolute deed was intended as a mortgage. But it will be found, we think, that many rulings on this topic which at first sight appear exceptional, are rather instances not embraced within the true meaning and scope of the rule. As such may be mentioned cases in which fraud, mistake or illegality has prevented the written instrument from acquiring original vitality as a contract, or those admitting evidence to identify its subject-matter as well as others in which the writing on its face appears to be an incomplete or merely one-sided expression of the terms of agreement. *Rollins v. Claybrook*, 1856, 22 Mo. 405; *Moss v. Green*, 1867, 41 id. 389. \* \* \* Obviously the oral testimony in question contradicted the very language of the writing in which these business men, dealing at arm's length, had deliberately expressed themselves. We think the learned circuit judge correctly held such testimony inadmissible, and that it could find no proper place in the case made by the pleadings, without departing from sound principle and precedents. *Brigham v. Rogers*, 1822, 17 Mass. 571; *Cleves v. Willoughby*, 1845, 7 Hill, 83; *Howard v. Thomas*, 1861, 12 Ohio St. 201; *Naumberg v. Young*, 1882, 44 N. J. Law, 331; *Diven v. Johnson*, 1888, 117 Ind. 512; *Stoddard v. Nelson*, 1889, 17 Oreg. 417; *McLean v. Nicol*, 1890, 43 Minn. 169; *Gordon v. Niemann*, 118 N. Y. 152; 23 N. E. Rep. 454."

4. So in Pennsylvania, the most liberal of all the States in admitting parol evidence, it was held in *Wodock v. Robinson*, Supreme Court of Pennsylvania, April 18, 1892; 24 Atl. Rep. 73, that the wife of a lessee, who by the terms of the lease took on himself the duty of making all the necessary repairs, cannot, in an action against the lessor for personal injuries resulting from the giving away of a floor, prove a parol agreement contemporaneous with the lease, providing for repairs for the lessor, in the absence of an averment of fraud, accident or mistake. The court observed: "It is nowhere alleged in the statement that the lessee was induced to sign the lease by any fraud, or that there was any accident or mistake in the drawing up of the instrument, or in the insertion of the covenant by which the lessee bound himself for the repairs necessary to keep the premises in good order and condition. There is only the bald statement that the defendant, when the lease was executed, promised, through her agent, that she would repair. The alleged

promise is therefore in flat contradiction of the terms of the instrument signed and sealed by the parties, and in the absence of a distinct averment in the plaintiff's statement of fraud, accident, or mistake, could not be proved at the trial, for it is as true now as it ever was, and is a rule too firmly rooted in justice and honesty to be easily eradicated from any system of wise laws, that all negotiations, all conversations, all oral promises, all verbal agreements, are forever merged in, superseded, and extinguished by the sealed instrument which is the final outcome and result of the bargaining of the parties. Unless you aver fraud or mistake, you can no more incorporate in it what does not there appear, than you can make and seal a new bond for the parties without their consent. You can no more blot out a word which it contains than you can tear off the signatures and seals of the parties. *Manent literæ scriptæ* is still the rule. The written instrument shall stand as the sole exponent of the minds of the parties. If it were not for this rule, no man would be able to protect himself by the most solemn forms and attestations against falsehood, misrepresentation, and perjury. In this matter the common law and the civil law are fully agreed, for *contra scriptum testimonium non scriptum, testimonium non fertur*, is the language of the Code. Code, Bk. 4, tit. 20. The cases upon this subject are myriad; many of them, at first blush, are seemingly inharmonious, contradictory, and irreconcilable with the established rule, and with other adjudications. But often the contradiction is only apparent, and not real, and dependent upon special circumstances, which clearly bring the case within the recognized exceptions of fraud, accident or mistake. However judges and courts may have differed in the application of the rule, no judge has had the hardihood to deny it, or to refuse to apply it in a clear case, free from the qualifying circumstances which bring it within the operation of the exceptions. It would be a day's journey to travel through the Pennsylvania cases alone in order to substantiate this. I shall content myself at present with a selection of three cases from the more recent reports, which not only sufficiently justify the present ruling, but are conclusive upon this point raised by the demurrer." Citing *Hunter v. McHose*, 100 Pa. St. 38, and continuing: "The case of *Jackson v. Payne*, 114 Pa. St. 67, was a well-considered case. The old and wholesome rule, which maintains the inviolability of written instruments by parol proof, was there fully

applied in an able opinion by Green, J., it being decided that parol evidence is not admissible to contradict or vary a written instrument where there is no allegation of fraud, accident, or mistake, nor any promise, then made, as to its use, which was subsequently violated. There an attempt was made to reform a mortgage by parol evidence, showing that it was given for an amount different from that expressed on its face, and the court below was reversed for leaving it to the jury when it should have given a binding instruction that both the defendant and the jury were concluded by the sum mentioned in the instrument. 'There was neither allegation nor proof of any fraud, accident, or mistake in the execution of the mortgage,' said the learned judge, 'and we have several times held that in these circumstances parol evidence is not admissible to contradict or vary written instruments.' And he then proceeds to marshal a goodly array of cases from recent decisions of the court which fully maintain the opinion. The case of *Eberle v. Bonafon's Exrs.* (Pa.), 4 Atl. Rep. 808, is as near the present case as possible. It is indeed squarely on all fours with it. That was an action of replevin for rent. The lease contained the following clause: 'The lessee promises the lessor to pay the rent punctually, and during the term to keep, and at the end thereof peaceably deliver up, the premises in good order and repair, reasonable wear and tear excepted.' The plaintiff offered to show that at the time the lease was signed it was agreed between the landlord and the tenant that the roof should be put in good repair, and other repairs made by the landlord, and that only on that condition the lease was signed, and that it would not have been signed except for that agreement. The offer was overruled, and there was judgment for the landlord, which was affirmed by the supreme court, the chief justice saying: 'There was no error in rejecting this evidence. It does not tend to establish fraud, accident, or mistake. Its purpose is to establish a contemporaneous parol agreement to change the effect of the written contract.' In the case now before us, as it is presented in the statement filed, the effort is, as it was in *Eberle v. Bonafon's Exrs.*, not only to strike out by parol a solemn covenant in a written and sealed instrument, but to write in its place another agreement flatly contradictory of it. No court should lend its aid to such an experiment. The three cases which I have referred to should stand forever as perpetual landmarks and towers of defense in this State against all such attempts to over-

throw the solemn agreements in writing of the parties, by substituting for them the uncertain and perishable recollection of parties or bystanders, or what is perhaps more frequently the case, their prevaricating, dishonest, and fraudulent statements."

5. So in *Angell v. Duke*, 32 L. T. Rep. (N. S.) 321, in the Queen's Bench, it was held that when defendant in writing let a house and furniture to plaintiff, evidence of a previous parol promise to put in more furniture was inadmissible. Cockburn, C. J., seemed inclined to limit the admissibility of additional parol agreements to those contemporaneous with the execution. The same was held in *Wilson v. Deen*, 74 N. Y. 531. The same was held in *Jox v. McKeevin*, — N. Y. Com. Pl. —, of an oral agreement for the exclusive use of a yard attached to leased premises. In *Wilson v. Deen*, *supra*, which was an action to cancel the lease, parol testimony was given which showed that "the plaintiff read the lease and knew its contents, and knew that it contained no covenant to put in more furniture than was already in the house, and knew that the furniture which they say the defendant had promised to put in had not all been put in." And in respect to the doctrine of collateral unexpressed engagements, the court said no reference had been made to it because "if the present case could be brought within the principle of those cases, it would not hold (avail?) the plaintiffs, as their only remedy would be an action of damages for the breach of the parol contract. The validity and effect of the deed could not be made to depend upon the performance of such collateral contract. To except from the rule that a deed cannot be controlled by contemporaneous oral stipulations cases in which such stipulations were an inducement to the execution of the writing, would be to abrogate the rule, for in almost every contract the undertakings of one party are a consideration for those of the other, and to say that the writing shall not take effect unless the oral stipulation is performed, would produce even a more serious result than not to enforce such oral stipulations." In *Dooley v. Baynes*, 86 Va. 649, it is said: "There is surely no principle which excludes parol evidence to show that a deed, which is apparently an absolute deed, is in reality a partition deed between coparceners, and therefore no conveyance at all." But it is not permitted to show by parol that a deed was not intended to be inoperative, or that the grantee was to reconvey to the grantor on request. *Hutchins v. Hutchins*, 98 N. Y. 56. This doctrine was followed, citing the last



case, in *Woodard v. Foster*, 64 Hun, 147, where F. deeded premises to the husband of W., who conveyed them to his wife. In ejectment by her, F. was allowed to prove that at the time of the conveyance to the husband the parties agreed that F. should have the use of the premises for his life. The court observed: "The obvious result of the evidence introduced to establish this claimed defense, if given effect, was to reduce the title conveyed by the defendant's deed, and to carve out of an absolute title in fee simple a life estate in the grantor. Thus the question is presented whether parol evidence was admissible for that purpose. That it was inadmissible under the general rule prohibiting the admission of parol contemporaneous evidence to contradict or vary the terms of a valid written instrument, there can be no doubt. It is however contended that the evidence was admissible under an exception to the rule which permits parol evidence when the original contract is verbal and entire and a part only is reduced to writing. The existence of this exception must be recognized, but evidence is not admissible under it which contradicts or varies the written instrument; to be admissible it must be consistent with it. *Chapin v. Dobson*, 78 N. Y. 74; *Thomas v. Scutt*, 127 id. 133, 138. Therefore the evidence was not admissible under that exception, because it was not consistent with, but in contradiction of, the deed. \* \* \* We are of the opinion that the evidence admitted fell within the condemnation of the general rule excluding parol evidence when in effect it would change or destroy the agreement between the parties which they had reduced to writing."

6. In *Johnson v. Oppenheim*, 55 N. Y. 280, it was held that evidence of statements by the lessor upon the execution of the lease, that no change should be made during the term in the occupation of the adjoining lot which would interfere with the enjoyment of the demised premises or with the lights, was properly rejected. Allen, J., said: "To engraft a new condition upon the lease by which the term was to end upon any contingency before the expiration of the time limited, would have been to change and vary the terms of the written agreement in an essential particular. The case is not within the rule which allows a collateral agreement, made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting its terms, to be given in evidence." Distinguishing *Erskine v. Adeane* and *Morgan v. Griffith*. So evidence has been held inadmissible to

show that the lessor orally promised to refrain from carrying on the butcher's business in the same block.' Or to ditch the land.<sup>2</sup>

7. A very recent review of the New York cases and the doctrine of Chapin v. Dobson may be found in Costello v. Eddy, in the Supreme Court of New York (34 N. Y. St. Rep. 565), the opinion in which was adopted by the Court of Appeals on their affirmance of the decision (128 N. Y. 650). The Supreme Court said :

"In Bayard v. Malcolm, 1 Johns. 466, Kent, Ch. J., incidentally lays down the rules as follows in discussing a question of pleadings: 'Nor could a *parol* warranty have been shown had the suit been brought on one; for the contract being reduced to writing excludes all other verbal negotiations and promises as being resolved into writing, which is the consummation and only evidence of the agreement of the parties.' In Colwell v. Lawrence, 38 N. Y. 73, Miller, J., in delivering the opinion of the court, says: 'The rule is well settled that all conversations had prior to the execution of the writing, become merged in the instrument when executed. In Wilson v. Deen, 74 N. Y. 534, Rapallo, J., in writing for the court, in upholding and following this rule in that case, uses this language: 'We think it impossible to sustain these conclusions without disregarding the established rule of law, that a written contract merges all prior and contemporaneous negotiations and oral promises in reference to the same subject, and that when the terms of a lease are in writing, the rights and duties of the parties depend upon the terms of legal intentment of the lease itself, or, as otherwise expressed, that it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, are embraced in the writing.' In Filkins v. Whyland, 24 N. Y. 339, Wright, J., in delivering the opinion of the court, says: 'When a contract is consummated by writing, the presumption of law is that the written instrument contains the whole of it, and will not allow to be showed oral representations or stipulations preceding or accompanying the execution of the instrument, differing from or not inserted in it. The agreement to which the contractors bound themselves is to be ascertained exclusively by the writing.' In Schmittler v. Simon, 114 N. Y. 183, the court reiterates this general rule in this form: 'The general rule

<sup>1</sup> Scholz v. Dankert, 69 Wis. 416.

<sup>2</sup> Diven v. Johnson, 117 Ind. 512.

But see Lewis v. Seabury, 74 N. Y. 409; S. C. 30 Am. Rep. 311.

is that where an agreement is reduced to writing, it as between the parties is deemed to merge and overcome all prior or contemporaneous negotiations and declarations upon the subject, and that no oral evidence is admissible to vary, explain, or contradict its terms.'

"The authorities relied upon to establish the plaintiff's contention fail, we think, in their application to this case, and are distinguishable from it in principle. They apply to a distinct collateral agreement on one side, which influences and forms the consideration of the agreement on the other side. In *Batterman v. Pierce*, 3 Hill, 171, the consideration for the note, which was signed by one party only, was not expressed in it, and the court held that it was competent to prove as between the parties the conditions upon which it was given. In the case at bar the contract was signed by both parties, and the consideration for the \$2,000.00 was expressed in the writing, and the instrument purports upon its face to be a complete agreement. *Potter v. Hopkins*, 25 Wend. 419. In *Chapin v. Dobson*, 78 N. Y. 74, the writing signed by one party and approved by the other, was that the machinery should be delivered 'on terms stated,' and the court put the decision on the ground that the original contract was verbal and entire, and part only reduced to writing, and cited on that head 25 Wend., and 3 Hill, *supra*. In *Dodge v. Zimmer*, 110 N. Y. 43, parol evidence was allowed to explain an ambiguity appearing on the face of a paper or agreement, and matters not claimed to be embraced in it or to constitute a part of it were allowed, so that we fail to see how that case is applicable in principle to the one at bar.

"The distinction seems to be where the writing purports upon its face to contain the entire agreement of the parties, it must have that effect, but when upon its face it purports to rest partly in writing and partly in verbal agreement or negotiation, it may be proved and enforced as a whole, or if it appears that a parol contract is independent of, and collateral to, a written agreement, it may be sued upon as an independent and distinct cause of action, leaving the writing to stand and to be enforced according to its terms. *Chapin v. Dobson*, 78 N. Y. 74, *supra*. But that rule is not applicable to this case."

8. In *Scholz v. Dankert*, 69 Wis. 416, an action for rent, parol evidence was held inadmissible to show that the lessor, as an inducement to the lease, orally promised not to engage in the

butcher business in the same block, during the term, and broke that promise. The court merely said: "The majority of the members of this court are of the opinion that the learned county judge properly excluded the offered evidence, and hold that the evidence offered does tend to add to and change the terms of the written lease."

9. In *Fusting v. Sullivan*, 41 Md. 162, the court said: "The test of admissibility in such cases is whether the evidence offered tends to alter, vary or contradict the written contract, or only to prove an independent collateral fact, about which the written contract was silent. In the former case the testimony is admissible; in the latter it is competent and proper. Although the good-will of the store and the agreement not to set up another were, according to the statement of Shipley, material elements of the consideration to be given for the purchase of the property, yet they were not necessarily involved in the purchase, nor referred to in the contract, and were in fact incidental and collateral."

10. In *Welz v. Rhodius*, 87 Ind. 1; S. C. 44 Am. Rep. 747, contemporaneously with a written lease of a hotel the lessor orally agreed not to engage in a rival business in the same city. In an action by the lessee for a breach of that agreement the court said: "Not disputing the general rule that parol testimony cannot be received to vary, contradict, add to or subtract from the terms of a valid written instrument, counsel for the appellant argue that the case is not within the rule; that the parol contract declared on is a separate contract, collateral only to the lease, in no manner tending to modify or affect any stipulation in the lease or right or obligation created by it; that the parol promise of the defendant was made in consideration that the plaintiff would purchase the hotel furniture and accept the lease of the hotel itself on the terms named in the writing, and otherwise than this, is an independent contract. We concur in this view. The cases are numerous in which this court has recognized and declared the admissibility of parol evidence to show the real consideration of a deed, mortgage, or other written contract, whether in form unilateral or *inter partes*, and that the consideration may be shown to have been different from that expressed in the writing."

"The proposition of counsel for the appellee, that when the consideration expressed is 'contractual,' it 'can no more be varied by parol than any other portion of a written contract,' is true, but

not to the extent which counsel seem to claim. If A. and B. bind themselves in writing by mutual promises, saying nothing of any other consideration, it is clear that nothing can be shown by parol to vary the meaning or force of the promise of either party; nevertheless, it may be shown that in consideration of the making of the written contract A. surrendered, or agreed by parol to surrender, for cancellation, an obligation which he held against B. The contract made, the promise given by either party, as expressed in writing, cannot be modified; but further or additional consideration may be shown, even though it consist of a promise of one party to the other, if it be to do something outside of and so far distinct from the written promise or contract as that the latter is not varied or modified.

“The case before us however does not, strictly speaking, involve proof of an additional consideration for the written lease beyond that expressed therein. On the contrary, the consideration of the parol promise sued on is shown to have been the lease itself and the purchase by the appellant of the hotel furniture and fixtures. In the language of the complaint: ‘In consideration that the plaintiff would purchase said furniture and lease said property’ etc., ‘the said defendant agreed to and with said plaintiff, verbally,’ etc. This is clearly a collateral undertaking, which in no manner restricts or enlarges any stipulation of the lease, or any obligation of either party, in respect to the subject-matter of that instrument. If at the same time the lease was made the parol agreement had been reduced to writing, in a separate instrument, and signed by the parties, it would be regarded as a collateral contract, not necessary to be referred to in any pleading based upon the lease; and it is no less a separate and collateral contract because made by parol. There is, as we conceive, no more reason for saying that the written lease excludes the proof of the alleged parol promise, than that it would also exclude proof of the contract for the sale of the furniture, if there had arisen a dispute between the parties in reference to that contract; as for instance, if the plaintiff had claimed that he did not get possession of all the articles purchased. If the agreement not to keep another hotel is merged in the lease, it may just as well be said that the contract for the sale of the furniture is likewise merged. That such collateral agreements may be enforced has been often judicially declared.

“To illustrate further the collateral character of this agree-

ment, let us suppose that instead of the appellee it had been a third person, who, upon consideration of the acceptance of this lease and purchase of the hotel furniture from the appellee by the appellant, had promised to retire and refrain from keeping hotel in Indianapolis. It is too clear for argument that such an agreement, though resting on the same consideration as the one pleaded, would be distinct from the lease, and could not be deemed to vary or affect in any way the terms of that instrument. The two agreements are no less distinguishable from each other because both made between the same parties. Counsel do not, as we understand them, deny that if the appellee had conveyed the property in fee to the appellant, specifying in the deed the price in money paid or *agreed* to be paid, it would have been competent to show such additional agreement, by parol, as is alleged; and the fact that an estate for years was created by a lease, wherein the payment of rent and other matters appropriate to be found in such a writing are provided for, and the lease signed by both parties, does not seem to us to make the case essentially different in this respect."

11. In *Lewis v. Seabury*, 74 N. Y. 413; 30 Am. Rep. 311, the court said: "The lease was in writing, and contained no stipulation of the defendant as to fixtures, but a clause that the plaintiff should make all 'improvements and repairs' necessary to be made on the premises *during the continuance of her term*, and that she should at the end of the term leave on the premises all the repairs and improvements that may have been made or put on the same. It is insisted by the defendant that this writing is conclusive of the contract, and precludes any evidence of the oral agreement as to fixtures." The plaintiff was allowed to give evidence that the defendant, for an independent consideration, promised that certain fixtures should remain for the plaintiff's use, but that the out-going tenant removed them; that defendant promised to replace them, but did not, and that plaintiff supplied them at her own expense, defendant agreeing to make it right. The court continued: "The case is undoubtedly very near the line, but I am inclined to think that such parol agreement was a separate and independent one, touching a subject not covered by the lease, and made for an independent consideration paid by the plaintiff, not stipulated for nor referred to in the lease. The promise that certain specific fixtures then on the premises should

be retained and remain there, so that the plaintiff might enjoy the benefit of them if she took the lease, may be sustained as a previous distinct collateral agreement, upon a collateral and independent consideration, which did not merge in the subsequent written contract of hiring. See *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, 6 Exch. 70; *Hope v. Balen*, 58 N. Y. 380. The case is distinguishable from such cases as *Johnson v. Oppenheim*, 55 N. Y. 280, where the parol agreement necessarily affected the premises themselves, and if admitted would have varied the terms of the instrument as to the identical property leased."

12. In *Lynch v. Hunneke*, N. Y. Super. Ct., General Term, 19 N. Y. Supp. 718, plaintiff took a written lease of the upper floors of a building, "with the appurtenances," the only access to which was by means of a hall and stairs, on the verbal condition that defendant would not rent the lower floor for a saloon, and would not permit a door to be cut in the wall between the hall and lower floor. *Held*, in an action to abate a door cut in violation of such conditions, that the court erred in excluding evidence of the parol condition, since the same formed part of the consideration of the lease. *Freedman, J.*, observed: "The general rule, which excludes conversations, negotiations and parol agreements, prior to the execution of a written agreement relating to and springing out of such conversations, negotiations, etc., does not apply (1) when the original contract, although verbal; yet was entire, and only a part of it was reduced to writing, in which case the part not so reduced can be proved by parol; and (2) when the consideration, or a consideration further than that expressed in the writing, does not appear in the writing, in which case the consideration, or the further consideration, may be proved by parol. *Hope v. Smith*, 35 N. Y. Super. Ct. 458, affirmed, 58 N. Y. 380. So parol evidence is always admissible as to the meaning which the parties themselves attached to a particular word or phrase in the contract. Such evidence does not contradict or vary the terms of the written contract, but is explanatory thereof. In the case at bar the lease was for the six lofts, 'together with the appurtenances.' These words gave to the plaintiffs whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and the plaintiffs took any easement or servitude used or enjoyed with the demised premises. *Doyle v. Lord*, 64 N. Y. 432.

As the appurtenances were not specified, parol evidence was admissible to show their character and extent, and that being so, parol evidence was admissible to show that the parties, preparatory to the execution of the lease, met and discussed such character and extent, and agreed that the appurtenances should include all that they appeared to include, and that the defendant would not make a change in such appearances in derogation of his grant, and that in strict reliance upon the promise of the defendant not to change the appurtenances as they then existed and were understood, the plaintiffs executed the lease. Parol evidence to this effect was partly given and partly offered to be given, but rejected. Moreover the plaintiffs did show that before the lease was executed the parties did meet and have a discussion; that in the course of it the defendant proposed that he should be allowed in express terms to be inserted in the lease to reserve the right of cutting a door from the hall into the saloon, and that the plaintiffs so strenuously objected to it, giving reasons for their objections, that the defendant expressly waived the point in plaintiffs' favor."

Mr. Abbott says (Trial Ev. 524, note): "A part of the apparent conflict in the decisions may be explained if we observe that it is one question whether such a collateral agreement may be proved for the purpose of sustaining an action for its breach, and a different question whether it may be proved for the purpose of defeating an action on the written lease." Mr. Jones gives the following "test for determining whether parol agreement is collateral": "If it interferes with the writing it cannot be proved; if on the other hand, it relates to a matter beyond the scope of the written contract, the writing does not affect it. \* \* \* In each case it must be determined from the character of the writing and from the circumstances of the case, whether the parol agreement offered to be proved was in regard to a matter which it is reasonable to infer the parties thought settled by the terms of the writing, and if it was, evidence to show it should be excluded. The writing must speak just so far as it is fair to conclude that the parties, acting as reasonable men and using intelligible language, intended it should speak, and no further."<sup>1</sup>

<sup>1</sup> Jones Const. Cont. sec. 141.



## CHAPTER XIII.

## MERCANTILE CONTRACTS.

- SEC. 53. Subject matter and circumstances.  
54. Conversations and acts of parties.  
55. Practical interpretation.  
56. Limitation of general rule.

**Sec. 53. Subject matter and circumstances.**

Parol evidence is admissible, in the construction of contracts, to define the nature and qualities of the subject-matter, the situation and relations of the parties, and all the circumstances, in order that the court may put themselves in the place of the parties, see how the terms of the instrument affect the subject-matter, and ascertain the signification which ought to be given to any phrase or term in the contract which is ambiguous or susceptible of more than one interpretation; and this, although the result of the evidence may be to contradict the usual meaning of terms and phrases used in the contract; but if the words are clear and unambiguous, a contrary intention may not be derived from the circumstances.

It has been said by an eminent authority: "Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is

often necessary to prevent the court in construing their language from falling into mistakes and even absurdities.”<sup>1</sup>

*Illustrations:* 1. The leading case under this rule is *Bradley v. Washington, etc., Steam Packet Co.* 13 Peters, 89, A. D. 1839. This was an action on the case by the defendants in error, to recover for hire of the steamboat *Franklin*. The agreement of hiring grew out of the following paper: “I agree to hire the steamboat *Franklin* until the steamboat *Sidney* is placed on the route, to commence to-morrow, 20th instant, at (\$35) thirty-five dollars per day, clear of all expenses, other than the wages of Captain Nevitt. W. A. Bradley, 19th November, 1831.” And a written acceptance of the same signed by the president of the company. The question was whether the plaintiff in error was bound to pay for the use of the *Franklin* during the time when the navigation of the Potomac was prevented by ice. Parol evidence was offered on his part and excluded, and the defendant in error had judgment for the use of the boat during that period. The court reversed the judgment for this error, and observed: “Without attempting to do what others have said they were unable to accomplish, that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result. That in giving effect to a written contract, by applying it to its proper subject-matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case. With this principle in view we proceed to inquire whether the evidence offered by the defendant in this case ought to have been received by the court. Now had the evidence been received, it would have disclosed the following state of facts: That the route mentioned in the contract was one on which the plaintiff in error transported passengers, and also the mail; that the steamboat *Sidney*, mentioned in the contract, was designed to perform this service, and that the *Franklin* was wanted for the same purpose; that the *Sidney* was then at Baltimore for the purpose of being fitted with her engine and equipments; that although the transportation of passengers and the mail was carried on by the plaintiff in error, in a steamboat, whilst the river was open; yet when the river was closed by ice, so that the navigation was obstructed,

<sup>1</sup> *Reed v. Insurance Co.*, 95 U. S. 23.

the plaintiff in error then transported passengers and the mail all the way overland, to Fredericksburgh; that when the river was thus obstructed, the plaintiff in error could not and did not use a steamboat; and that all these facts were known to the defendants in error. We think that this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties, and in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to its proper subject-matter."

2. In *Barry v. Bennett*, 7 Metc. 354, A. D. 1844, A. mortgaged to B. "one ton of wire," and afterward sold to D. all his wire, amounting to 2,662 pounds; B. brought this action to recover of D. the value of the wire. B. was allowed to show by parol that A. and B. did not mean a precise ton in weight, but a certain mass of wire stored in a certain place, and estimated as a ton.

3. In *Knight v. N. E. Worsted Co.* 2 Cush. 271, 283, A. D. 1848, Chief Justice Shaw observes: "In expounding a written contract, although parol evidence is not admissible to prove that other terms were agreed to, which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it, yet it is competent to offer parol evidence to prove facts and circumstances respecting the parties, the nature, quality and condition of the real and personal property which constitute the subject-matter respecting which it is made."

4. *Bainbridge v. Wade*, 20 L. J., N. S., Q. B. 7, A. D. 1850, was an action on a guaranty of "the payment of any sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed at any time the sum of one hundred pounds." The defendant insisted that the form of the instrument necessarily limited the liability to debts already contracted at its date. Lord Campbell says: "But evidence may be received of the circumstances of the party at the time when the instrument was framed, in order to show in what sense the instrument was made. \* \* \* The instrument may be construed to apply only to a further debt. I should think that is the natural construction. But when we find that the defendant knew very well that Little had no dealings with the plaintiff, what other construction can be put upon it, but that if credit is given to Little, the defendant would be liable to the extent of £100?"

5. *Lowry v. Adams*, 22 Vt. 160, A. D. 1850, was an action on

a written guaranty, addressed to no one in particular, to be responsible for goods to be bought by another. The question was, whether its efficacy was exhausted by a purchase from one party upon its credit, or whether it operated as a continuing guaranty to other vendors who sold on the strength of it. The court remark: "For the purpose of ascertaining the intent of the parties in entering into any contract, courts will look at the situation of the parties making it, the subject-matter of the contract, the motives of the parties in entering into it, and the object to be attained by it; and even in cases where the contract is reduced to writing, will allow all these circumstances to be shown by parol evidence, if the intent of the parties upon the face of the contract is doubtful, or the language used by them will admit of more than one interpretation. When from the contract itself and all the surrounding circumstances, the true object and intent of the parties has been ascertained, courts will enforce the contract according to that intent, unless there be found in the way some stubborn, inflexible rule of law, absolutely requiring a different determination." The judge reviews the circumstances as shown by the proof, and comes to the conclusion that the defendant must have intended a general letter of credit, and reverses the judgment.

6. *Noyes v. Canfield*, 27 Vt. 79, 1854, was an action upon a written agreement to transport the plaintiff's "freight" during the navigable season of 1852, at a fixed price per ton. For the purpose of showing the meaning of this expression, as used by the parties, and that it was not intended to include hay, parol evidence was admitted, under objection, showing the nature, character and extent of the plaintiff's freighting for several years previous to the making of the contract, that the defendant during those years had done the plaintiff's freighting under similar contracts, and that the defendant was familiar with the plaintiff's business and the kind of property he had had transported. On review this was held proper evidence.

7. *Blossom v. Griffin*, 13 N. Y. 569, A. D. 1856, was an action against defendants as common carriers, to recover for damage caused to merchandise by an accidental fire. The defendants had signed a receipt for the goods, reciting that they were marked for New York, and expressing that they were "to be forwarded. Defendants were both common carriers and forwarders. Evidence was received of an oral agreement previously made by defendants

with plaintiff to carry his merchandise of the description in question to New York, at a stipulated price. The referee found that the goods were received by defendants as common carriers, and rendered judgment against them. This was affirmed, the court holding that the receipt amounted to an agreement, but that the evidence was properly received. Comstock, J., after arguing that the goods might be recovered for under the parol agreement, independent of the agreement in the receipt, proceeds: "But the receipt itself, in my opinion, admits of a different interpretation from that which has been thus far conceded. In construing this, as every other writing, it is proper to look at all the surrounding circumstances, the pre-existing relations between the parties, and then to see what they mean when they speak. If no facts had been shown outside of the receipt itself, it might and probably would have imported simply an obligation to deliver the goods to some safe and responsible carrier, to be transported to their destination. But calling in the aid of all the circumstances, viewing the defendants also as carriers, and looking at their existing obligations to the plaintiffs, a fair exposition of the language used is that the property was to be "forwarded," not in the exact and technical sense which excludes the idea of transportation, but to be carried forward to its destination, as marked on the goods and expressed in the receipt, by their own line of conveyance, according to their antecedent agreement. There is no rule which requires the words of a contract to be construed in their technical sense. In general the rule is the reverse, and there is certainly no necessary meaning of the phrase 'to forward,' which excludes the interpretation suggested. There can be no doubt that this was what the parties intended, and I am quite clear that in adopting such a construction, we do no violence to the language in which they expressed themselves." Johnson, J., after conceding that the receipt unexplained would import only the obligation of forwarders, proceeds: "But whenever it becomes necessary for the court, in order to interpret an instrument, to resort to proof of extrinsic facts at all, it ought to hear all the facts and circumstances legitimately bearing upon the subject to which the instrument relates. It should then surround itself with all the material facts and circumstances which surround the parties at the time, and occupy as nearly as possible their position. Hence proof of the other facts connected with this transaction became not only important, but absolutely necessary, to enable the court to per-

form its duty of interpreting the writing and determining the true intent and meaning of the terms employed."

8. *Price v. Mouat*, 11 C. B. N. S. 508, 1862, was an action by servant against master for wrongful dismissal. The agreement of hiring was in writing. The defendant dismissed the plaintiff because he refused to fold lace on cards, as desired. The plaintiff offered to show by parol that he was hired in the capacity of "lace buyer," and that his refusal was therefore justifiable. The evidence was admitted, the writing being silent as to the capacity in which the servant was hired.

9. *Griffiths v. Hardenbergh*, 41 N. Y. 468, 1869. In this case there was a bond of indemnity to the sheriff for levying, etc., under an execution. The action was brought to recover indemnity for damages recovered against the sheriff for entering a dwelling-house to make a levy, previous to the execution of the bond. Evidence that such entry was made at the request and by the advice of the obligor, and that at the time the sheriff had refused to proceed unless indemnified by the obligor, was held admissible. "This is not a modification of the contract," says the court, "but an interpretation of it by the light of the surrounding facts as they existed at the time of its execution and delivery."

10. In *Peisch v. Dickson*, 1 Mason, 9, A. D. 1815, Judge Story observes: "There seems to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, and that is where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties. In such a case I think that parol evidence might be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred." He admitted parol evidence in this case.

11. In *Burr v. Broadway Ins. Co.*, 16 N. Y. 267, there was an insurance on a building "on the No. west corner," etc. The insured owned the building on the northwest corner, and also one on the southwest corner, corresponding with the other and with the description of the policy in other particulars, except in one particular in which it answered to the survey. It was held that extrinsic evidence was admissible to show that the southwest corner was intended. But parol evidence is not admissible to show, in an action on an insurance policy which clearly de-

scribes the policy, that it was the intention to insure different property.<sup>1</sup>

12. Such evidence was accepted to prove the meaning of the word "team"<sup>2</sup> (this included declarations of the parties); of "eleven thousand feet of lumber now in the shop";<sup>3</sup> of "all the pine timber, twelve inches heart and up";<sup>4</sup> of "early spring";<sup>5</sup> of "in a good and substantial manner, as flood dams should be built in each stream, cribbed, sparred," etc.;<sup>6</sup> of "good fine wine";<sup>7</sup> of hops "of the first quality";<sup>8</sup> "certain notes";<sup>9</sup> "candlestick complete";<sup>10</sup> "Cooley's Hay Stackers."<sup>11</sup>

13. In *Crosby v. Pres't, etc.*, 128 N. Y. 641, a canal company contracted for the building of boats, and furnished some of the lumber to the builders, but whether with an intention of absolute sale or that it should be used only in the construction of the boats, was disputed. The order from the builders commenced with the words "Please send us" the following lumber. After shipment, the company forwarded its bill, made out in the usual form on one of its blank bill-heads. The order and bill were both introduced to show an absolute sale in an action against the company for retaking the lumber from those to whom the builders had sold it. *Held*, in such an action that inasmuch as the bill, which was not contemporaneous with the contract, had an equivocal meaning, and had been used against the company as an admission of sale, the company was entitled to show by parol that its object was merely to advise the builders of the value of the lumber which would be charged against the boats, and that such an explanation was not an attempt to alter or vary a written contract.

14. Where a contract to do two hundred dollars' worth of grinding contains no terms, they may be shown by parol.<sup>12</sup> Where there is a contract to carry goods on a railway, to a named station, and there are two stations of that name, the one intended may

<sup>1</sup> *Holmes v. Charlestown M. F. Ins. Co.*  
10 Metc. 211; S. C. 43 Am. Dec. 428.

*Sanders v. Cooper*, 115 N. Y. 279; S.  
C. 12 Am. St. Rep. 801.

<sup>2</sup> *Ganson v. Madigan*, 15 Wis. 144; S.  
C. 82 Am. Dec. 659.

<sup>3</sup> *Galen v. Brown*, 22 N. Y. 37.

<sup>4</sup> *McKenzie v. Wimberly*, 86 Ala. 195.

<sup>5</sup> *Phoenix Iron Co. v. Samuel*, — Pa.  
St. —.

<sup>6</sup> *Quigley v. DeHaas*, 98 Pa. St. 292.

<sup>7</sup> *Hogins v. Plympton*, 11 Pick. 97.

<sup>8</sup> *Wallace v. Rogers*, 2 N. H. 506.

<sup>9</sup> *Bell v. Martin*, 18 N. J. L. 167.

<sup>10</sup> *Sarl v. Bourdillon*, 1 C. B., N. S. 188.

<sup>11</sup> *Clark v. Crawfordsville Coffin Co.* 125  
Ind. 277; 25 N. E. Rep. 288.

<sup>12</sup> *Inglebright v. Hammond*, 19 Ohio,  
337; S. C. 53 Am. Dec. 430.

be shown by parol.<sup>1</sup> So where by a bill of lading goods were to be delivered at "the Essex Railroad wharf," and there were two wharves thus called, evidence was allowed to show which was intended.<sup>2</sup>

15. In *Merriord v. U. S.* — *U. S.* —, proposals for bids for 4,400,000 pounds of oats for army purposes were advertised by the United States. M. made several bids for 1,600,000 bushels at varying prices. H. also made bids. One bid of M. was accepted for 1,600,000 pounds, and one bid of H. for 2,600,000 pounds, was accepted, and contracts were made with the parties identical in form. Each contract contained a clause by which, in addition to the specific quantity of oats therein mentioned, the contractor agreed to supply such other quantity, more or less, as might be required for the wants of the station where the oats were to be delivered. *Held*, that the government was not obliged to receive from M. oats beyond the amount for which his bid was accepted, even though the government had use for a greater quantity of oats, and M. was able to and offered to supply such oats. The court said: "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. *Nash v. Towne*, 5 Wall. 689; *Barreda v. Silsbee*, 21 How. 161; *Shore v. Wilson*, 9 Cl. & Fin. 555; *Macdonald v. Longbottom*, 1 El. & El. 987; *Mumford v. Gething*, 29 L. J. (N. S.) C. P. 110; *Carr v. Montefiore*, 5 Best & S. 408; *Bradley v. United States*, 98 U. S. 104. Thus in the case of *Doe v. Burt*, 1 T. R. 703, where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it, and to pay rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, the court held that parol evidence

<sup>1</sup> *Robinson v. Gt. West. Ry. Co.* 35 L. J. (N. S.) C. P. 123.

<sup>2</sup> *Sutton v. Bowker*, 5 Gray, 416.



of the surrounding circumstances was admissible to show that it did not pass."

16. In *Bedard v. Bonville*, 57 Wis. 270, by a written contract plaintiffs agreed to finish two stores in a certain manner, "and also to finish the front part of the basement, with the stairway going up to the second story, and also the outside two cornices," etc. In an action to recover for extra work done on the inside of the front basement wall, it was held that the language of the contract was so vague and ambiguous that extrinsic evidence was admissible to aid in its construction, and that upon such evidence it should have been submitted to the jury to determine whether the work in question was covered by the contract or not. The court said: "Unaided by extrinsic evidence this court is of the opinion that 'the front of the basement' means not merely the external front, but both sides of the front basement wall. Such evidence was held admissible by this court in the following cases: *Ganson v. Madigan*, 15 Wis. 144; *Prentiss v. Brewer*, 17 id. 636; *Rockwell v. Ins. Co.*, 21 id. 548; *Lyman v. Babcock*, 40 id. 508; *Monitor Iron Works v. Ketchum*, 44 id. 126-131. In the last case it was held that works 'connected with steam on,' in a contract for furnishing and setting up a steam-engine, were or might be words of technical meaning, and that an expert might testify as to their meaning as used in such contract. So the language in the contract in this case is certainly ambiguous, and may to a certain extent be considered words of technical meaning, and are therefore subject to explanation by extrinsic evidence of all the circumstances attending the making of the contract, and also by the evidence of experts familiar with contracts of that nature. *Whart. Ev.* (2d ed.) § 972; *Collyer v. Collins*, 17 Abb. Pr. 467."

17. A memorandum for the sale of lumber was as follows: "Sold to B. & K. \* \* \* 100 M 1-inch shipping culls, to be shipped before July 1st, at \$11.25, they to pay the B. C. railway charges; and 100 M 1-inch shipping culls, to be shipped after August 25th and before October 1, at \$11; and 100 M 16 $\frac{1}{2}$ -inch and up wide coffin boards, sound, common, seasoned eight months. Terms, two months." It was held that evidence was competent to show the price of the last lot of lumber, and the time for delivery, and explain the term "two months."<sup>1</sup>

18. In *Peabody v. Bement*, 79 Mich. 47, the contract was to insert advertisements in a catalogue, the advertisers to furnish

<sup>1</sup> *Hurd v. Bovee*, 26 N. Y. St. Rep. 834; 45 id. 934.

electrotypes, but no time therefor was fixed. Evidence was allowed that the publisher was to furnish certain information to the advertiser and that he was to publish no other advertisement of the same kind, as bearing on the question of time.

19. Parol evidence is competent to identify the property in a chattel mortgage. *Galen v. Brown*, 22 N. Y. 37.

20. C. did business at Buffalo, and did his banking business with plaintiff. The plaintiff demanding more security for loans, he gave him a letter of credit from his father-in-law, residing in Canada, as follows: "Please discount for Mr. Cummer to the extent of \$4,000. He will give you customers' paper as collateral. You can also consider me responsible to the bank for the same." In an action thereon, *held*, that evidence of the circumstances was competent to show that it was intended as a continuing guaranty, not ceasing with the discount and payment of the stated sum, but continuing, in spite of a change in C.'s business, until terminated by a notice from the defendant.<sup>1</sup>

In *Heffield v. Meadows*, L. R. 4 C. P. 595, the court said: "It is proper to ascertain that (the subject matter), for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guaranty by word of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guaranty. Having done that, it will be proper to turn to the language of the guaranty, to see if that language is capable of being construed so as to carry into effect that which appears to have been the real intention of both parties." So in *Coquillard v. Hovey*, 23 Neb. 622, S. C. 8 Am. St. Rep. 134, evidence was allowed to explain whether "notes taken" was intended to extend to notes taken afterward.

21. In *Roots v. Snelling*, 48 L. T. Rep. (N. S.) 216, S. signed a written contract with R. to purchase a brick-field for £17,000, to be paid as follows: £16,000 in cash, and £1,000 in freehold equities, to pay on the £1,000 12 per cent. per annum. Before signing S. had made out and given to R. a list of freehold houses, in which he was entitled to the equity of redemption, but this document was not referred to in the contract. *Held*, that such list was admissible by way of parol evidence to explain the mean-

<sup>1</sup> *White's Bank v. Myles*, 73 N. Y. 335 ;

S. C. 29 Am. Rep. 157.

*Gardner v. Watson*, 76 Tex. 25.

*Hotchkiss v. Barnes*, 34 Conn. 27.

*Columbus S. P. Co. v. Ganser*, 58 Mich.

385 ; S. C. 55 Am. Rep. 697.

ing of freehold equities in the contract. In *Griswold v. Sawyer*, 125 N. Y. 411, upon parol proof of the circumstances it was held that "legal representatives," in a life insurance policy, meant the heirs and next of kin of the assured. Where a contract was to pay "ruling market rates" for goods, and there was one rate for the importers and another for the jobbers, parol evidence was admitted to determine which was meant.<sup>1</sup> And so to determine the meaning of "cold storage."<sup>2</sup>

22. In *Agawam Bank v. Strever*, 18 N. Y. 502, parol evidence was admitted to explain the word "incurred," in a memorandum stating that a note was "left as collateral security for all liabilities incurred," etc., by showing that the signers were at the time under no liability to the bank. Selden, J., observed: "Now it is true that upon a strict grammatical construction of these terms, they would be held to embrace only liabilities which had been already incurred. The word 'incurred' being in the past tense, when used without other words to modify its meaning, would in strictness relate exclusively to past transactions. Were this memorandum therefore to be construed by itself, without the aid of any extrinsic fact or circumstance whatever, I am inclined to think the interpretation contended for by the appellant's counsel the one which should be adopted; especially as against the defendants, who are mere sureties. But its meaning can hardly be regarded as so entirely clear and unequivocal as to exclude all aid from the circumstances surrounding the parties at the time of entering into the contract. It is not usual to pay a very nice and critical regard to grammatical rules in the use of language in the ordinary transactions of business; and no interpretation which depends upon a very rigid application of those rules can well be considered as so satisfactory as not to admit of modification by any species of extrinsic proof. It was proper therefore, upon the trial, to resort to evidence of the attending circumstances to assist in ascertaining the meaning and intention of the parties. The proof adduced for that purpose, that at the time the note was left with the bank, neither Isaac S. Doane, nor Doane & Hoysradt were under any liabilities to the bank, was of the highest

<sup>1</sup> *Manchester Paper Co. v. Moore*, 104 N. Y. 680.

<sup>2</sup> *Behrman v. Linde*, 47 Hun, 530.

See also *Dexter v. Ohlander*, 89 Ala. 262.

*Pa., etc., Nav. Co. v. Dandridge*, 8 G. & J. 248; S. C. 29 Am. Dec. 543.

*Lancaster Mills v. Merchants' Co.*, 89 Tenn. 1; S. C. 24 Am. St. Rep. 586.

*Bergin v. Williams*, 138 Mass. 544.

importance, and left no doubt as to the true construction of the terms of the memorandum."

*Railroad tickets:* In *N. Y., etc., R. Co. v. Winter's Admrs.*, 12 Sup. Ct. Rep. 356, there was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca, after stopping off at the former place. It was shown by the evidence that Olean was a station at which stop-over privileges were allowed. "Under such circumstances it was entirely proper for the passenger to make inquiries of the ticket agent and to rely upon what the latter told him with respect to his stopping over at Olean. \* \* \* The reason of such rule is to be found in the principle that when a party does all that he is required to do under the terms of a contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party; for such breach of contract." With regard to the admission of parol evidence to vary the contract between the parties constituted by the ticket and the regulation of the company, the language of the court is as follows: "While it may be admitted as a general rule that the contract between the passenger and the railroad company is made up of the ticket which he purchased and the rules and regulations of the road, yet it does not follow that parol evidence or what was said between the passenger and the ticket-seller, from whom he purchased his ticket, at the time of such purchase, is admissible as going to make up the contract of carriage, and forming part of it."

The circumstances provable are only such as were known to both the parties.<sup>1</sup>

#### **Sec. 54. Conversations and acts of parties.**

The conversations and acts of the parties to a contract, at and about the time of the making of the contract, as well as subsequent to the making of the contract, are admissible in evidence to show what sense the parties attached to any term or phrase used in the contract, which is in itself susceptible of more than one interpretation, or which, viewed in the light of the evidence

<sup>1</sup> *Brady v. Cassidy*, 104 N. Y. 155.

explanatory of the subject-matter, the relations of the parties, and the circumstances, may reasonably be susceptible of more than one interpretation.

*Illustrations:* 1. In *Birch v. Depeyster*, 1 Starkie, 167, A. D. 1816, an action for ship freight, earned in respect of goods carried in the cabin, the defendant was to receive a stipulated sum in lieu of *privilege* and *primage*; and the question being whether the contract prohibited the captain from using the cabin for carrying goods on his own account, evidence of a conversation between the parties before the agreement was entered into, in which the plaintiff stated that the defendant was to have the use of the cabin for himself, was admitted to explain the terms in question.

2. In *Wait v. Fairbanks*, Brayton (Vt.) 77, A. D. 1817, parol evidence of the agreement and understanding of the parties was admitted to explain the term "good custom cowhide."

3. In *Gray v. Harper*, 1 Story, 574, A. D. 1841, parol evidence of the contemporaneous conversations of the parties was admitted to explain the term "cost."

4. So in *Walrath v. Thompson*, 4 Hill, 200, A. D. 1843, conversations were admitted to explain "your account" in a guaranty, and to show that it applied not to an existing account, but to one subsequently contracted on the faith of the letter.

5. In *Hart v. Hammett*, 18 Vt. 127, A. D. 1846, an action on a contract for the sale of "winter strained lamp oil," it having been shown that this phrase signified sometimes sperm oil, and sometimes whale oil, the defendant was allowed to prove that he informed the plaintiff, at the time of the execution of the contract, that it was not for sperm oil. The court say: "In many cases an inference of intention is drawn from circumstances. If the intention of the parties is expressly declared, this should be regarded as far more satisfactory than to have the intention inferred; and evidence to this point cannot but be material and relevant to the inquiry."

6. In *Norton v. Woodruff*, 2 N. Y. 153, A. D. 1849, the court, holding that the terms in question were unmistakable, decided that neither the subsequent declaration nor conduct of the defendant were admissible, but concede that evidence of this character may be resorted to for the purpose of proving the sense in which particular terms were used by the parties.

7. In *Almgren v. Dutilh*, 5 N. Y. 28, A. D. 1851, an action for ship freight, proof of a conversation between the captain and defendants when in negotiation for the charter, was admitted to show that "necessary" did not mean "indispensably necessary," Gardener, J., remarking: "It did not go to vary the written agreement, but to prove by the acts of the parties the space which they esteemed necessary for the accommodation of the crew."

8. In *Barrett v. Stow*, 15 Ill. 423, A. D. 1854, conversations of parties were admitted to show that "building" included an ell.

9. In *Macdonald v. Longbottom*, 28 L. J. N. S. Q. B. 293, A. D. 1859, a prior conversation of the parties was allowed to be proved to show that "your wool" embraced some that the plaintiff had contracted to buy of others, as well as his own clip. Ch. J. Campbell says: "Is there any difficulty in admitting what passed at that conversation? I think that there is none. It is no part of the contract, and is not adding to or varying a written contract, but it is evidence which enables us to say what the contract referred to."

10. In *Mumford v. Gething*, 7 C. B. N. S. 305, A. D. 1859, in order to show that a contract was not void in restraint of trade, evidence of a prior conversation of the parties was admitted to prove that "ground" was the "midland district."

11. In *Ganson v. Madigan*, 15 Wis. 144, A. D. 1862, contemporaneous declarations of the plaintiff's agent to the defendant were allowed to be shown to explain the meaning of the word "team," as to whether a two-horse or a four-horse team.

12. In *Blair v. Corby*, 37 Mo. 313, A. D. 1866, where the inquiry was as to the meaning of "hard pan," evidence of the express agreement that the contract was not to apply to indurated earth was held admissible.

13. In *Thorington v. Smith*, 8 Wall. 1, A. D. 1868, to show that "dollars" meant Confederate dollars, proof of the contemporaneous agreement and understanding of the parties was adjudged proper.

14. In *Stoops v. Smith*, 100 Mass. 63, A. D. 1868, an action of contract against a trader in sewing machines, upon an agreement to pay for advertising charts, parol evidence of the plaintiff's declarations at the time of its execution was held admissible to show that the charts were to be of cloth and posted in a certain way. The court say: "The terms of the negotiation itself, and statements therein made may be resorted to for this purpose. \* \* \*

If the previous negotiations make it manifest in what sense they used and understood those terms, they furnish the best definition to be applied in the interpretation of the contract itself."

15. In *Swett v. Shumway*, 102 Mass. 365, A. D. 1869, an action on a contract for the manufacture and delivery of *horn* chains, the plaintiff was allowed to prove that the defendant was informed and knew, at the time of its execution, that the chains manufactured thereunder were to be partly made of *hoof*, *horn* being a general designation in the trade for chains made of either indiscriminately. The court said: "Parol testimony of that which was in the minds of the parties, and to which their attention was directed at the time, may be given. It may be shown that a sample to which the terms of the contract are applicable, was exhibited or referred to in the negotiation, and other statements of the parties then made may be resorted to. The sense in which the parties understood and used the terms used in the writing is thus best ascertained."

16. In *Goodrich v. Stevens*, 5 Lans. 230, A. D. 1871, the question was as to the meaning of the words "his crop of flax." In order to show that it was designed to embrace flax purchased by the vendor from others, as well as what he himself raised, it was held competent to adduce parol evidence of a conversation between the parties several weeks before the contract was drawn up, and also of like conversations on the day of its execution, just before and just after it was executed.<sup>1</sup>

17. The case of *Field v. Munson*, 47 N. Y. 221, A. D. 1872, although rather inadequately reported, seems to be an authority to the same effect. In that case there appears to have been a contract evidenced by certain letters. The contract "was not entirely intelligible," observe the court, "and the situation and relation of the parties toward each other, and the circumstances attending the *negotiation* and sale of the starch were competent. Again, the circumstances proved, *including the interview of the plaintiffs with Stevens on the subject*, and preliminary to the sale, were parts of the *res gestæ*. The letters of the defendant, relating to the transaction, were competent against him as declarations or admissions."

18. Where cloves were sold by sample, and there was a bill of sale of "two casks of cloves," evidence was allowed to show

<sup>1</sup> But see *Norris v. Clark*, 33 Minn. 476; *contra*, as to "my brick."

the kind of cloves bargained for.<sup>1</sup> So in a case of sale of 'white willow saplings.'<sup>2</sup>

19. In an action on a written contract for stone at a specified price "per perch," the contract not specifying the number of cubic feet in a perch, and the evidence on that point being conflicting, it was held that parol evidence of the oral negotiations and agreement of the parties is admissible to explain the ambiguity.<sup>3</sup> Where a building contract provided that "the entire walls of the building, inside and outside, are to be painted," conversations of the parties were held admissible to show whether it was the intention to have the plaster painted.<sup>4</sup> Where it was agreed that machines were to be delivered "as soon as possible," evidence was admitted that the vendor represented that he had them in stock.<sup>5</sup> Where a contract was to furnish "all materials and labor for plumbing," oral evidence of the agreement that this should not include kitchen ranges was allowed.<sup>6</sup>

*Contrary authority:* On the other hand, in *Dent v. N. A. Steamship Co.*, 49 N. Y. 395, Rapallo, J., remarks in relation to evidence offered to explain an ambiguous contract: "Facts existing at the time of making the contract may therefore be properly considered for the purpose of interpreting this language; but *no evidence of the language employed by the parties in making the contract* can be resorted to, except that which is furnished by the writing itself. The referee therefore properly excluded evidence of verbal agreements preceding the writing of the letter." The case does not disclose exactly to what this language applies. If only to previous *agreements* between the parties it may be sound; but if to negotiations relating to the agreement in question, the language italicized is in opposition to a long and almost unbroken line of adjudications, including several in the same court. In view of this line of decisions the Court of Appeals, in the *Dent* case, can scarcely be supposed to decide quite what their language strictly considered would indicate, especially as none of the foregoing cases were alluded to, nor indeed was any authority cited except a section of *Greenleaf's Evidence*. Indeed, considering the matter upon principle, there can be no doubt of the correctness of these decisions. If extra-

<sup>1</sup> *Bradford v. Manly*, 13 Mass. 139.

<sup>2</sup> *Pike v. Fay*, 101 Mass. 134.

<sup>3</sup> *Quarry Company v. Clements*, 38 Ohio St. 587; 43 Am. Rep. 442.

<sup>4</sup> *Beason v. Kurz*, 66 Wis. 448.

<sup>5</sup> *Tufts v. Greenewald*, 66 Miss. 360.

<sup>6</sup> *Cassidy v. Fontham*, 38 N. Y. St. Rep. 177.



neous *facts* may be considered in explanation of an ambiguity, in order to show the court what the parties had in their minds, the still more certain index to their meaning, namely, their oral *language*, should also be considered for the same purpose. The object of such evidence is elucidation of the meaning of parties, not contradiction of their purpose. The evidence is received, as C. J. Gibbs says in *Birch v. Depeyster*, "just as you would look into a dictionary in order to ascertain the meaning of a word," and as Erle, J., says in *Macdonald v. Longbottom*, "it would not vary the contract nor would it add to it; it is not only the meaning of the plaintiff, but also of the defendant."

Several text writers however disapprove the admission of conversations. Thus Taylor (Ev. sec. 1193) says of *Birch v. Depeyster* and *Gray v. Harper*, "the principle of these cases is not very clear, and no great weight should in prudence be attached to them; and Powell (Ev. 456) says that in all cases where explanatory extrinsic evidence has been received "it has been received not in the form of declarations of intentions by parties, but in the form of collateral and surrounding facts," etc. The career of adjudication however has far outstripped the limitation.

### Sec. 55. Practical interpretation.

Where the language of the contract is indefinite or ambiguous, the practical interpretation of the parties themselves, by their acts under it, is entitled to great if not controlling influence.<sup>1</sup>

*Illustrations*: 1. In *Bement v. Claybrook*, — Ind. —; 31 N. E. Rep. 556, the contract was for the sale of "all the large cottonwood and sycamore trees on the Kentucky side of Diamond Island." The defendant contended that "there is a patent ambiguity, and insisted that the words 'large trees' furnish no definite standard of comparison by which to identify what was sold, and that the

<sup>1</sup> *Chicago v. Sheldon*, 9 Wall 50.

*Vinton v. Baldwin*, 95 Ind. 433.

*Ketcham v. Brazil*, etc. Co. 88 Ind. 515 (including conversations).

*Vermont St. M. E. Church v. Brose*, 104 Ill. 206 (to explain "stone for front and footing being furnished, no ex-

trinsic evidence can be more valuable").

*Lovejoy v. Lovett*, 124 Mass. 270 (to explain ambiguous deed).

*Gray v. Clark*, 11 Vt. 583 (to explain "including").

*Wilson v. Randall*, 67 N. Y. 338.

contract is so indefinite and uncertain as to the subject-matter upon which it was to operate that it cannot be the basis of an action for damages, but the court observed: "Where the parties reduced their agreement to writing and signed it, and proceeded to act under it, they indicated their own belief that they had made a binding contract, and that the instrument executed by them was not an idle form of words. If it be possible, under the mode of its presentation to the court, the contract must be construed so as to render it operative and not void. If a lawful intention of the parties can be drawn from all the language employed in the written instrument, examined with reference to the subject and the surroundings as shown by the pleading, without contradicting or varying the written words by oral language, that intention should be effectuated. The intention of the parties ascertained from extrinsic facts, for the purpose of upholding an uncertain written contract, must be an intention compatible with a fair and reasonable interpretation of the written language. The parties, and not the court, must make the contract, and they must abide by the written terms employed. If their intention cannot be gathered from the written language thus explained by extrinsic facts, the contract will be held void for uncertainty; but the effort of the court should be to ascertain the intention, if possible, by a reasonable and just construction. All this is elementary, and authorities need not be cited. Where the language of a written contract is indefinite, ambiguous, or of doubtful construction, the practical interpretation given it by the parties in acting pursuant to it is entitled to great, if not controlling, influence in arriving at the true intention. *Chicago v. Sheldon*, 9 Wall. 50; *Reissner v. Oxley*, 80 Ind. 580; *Lyles v. Lescher*, 108 Ind. 382, *Gaylord v. City of Lafayette*, 115 Ind. 423; *Railroad Co. v. Reynolds*, 118 Ind. 170. The written contract set out in the complaint indicates a purpose to sell all the cottonwood and sycamore trees on the Kentucky side of Diamond Island, large enough to be made into logs, which could be taken at the bank, and there be measured as logs. The complaint shows the location of Diamond Island, and that there was a timbered strip of a certain width on the side indicated in the contract. It is shown that all the large cottonwood and sycamore trees in this strip were sold by the contract, and at the time of the making of the contract there were standing in the location defined in the contract large cottonwood and sycamore trees which, when cut into logs, would equal \$1,000,000 feet.

The contract does not state the size of the trees sold exactly, or by mentioning a maximum, minimum, or average size; but it is alleged in the complaint, that in pursuance of the contract, the purchaser cut and measured on the bank of the river \$300,000 feet of logs for which he paid the seller the price agreed upon. The trees from which these logs were made must be taken to have been trees of the kind intended by the parties in their written contract. They so treated them themselves."

2. In *Frazier v. Myer*, — Ind. —; 31 N. E. Rep. 536, where there was a grant of a right of way "not to be fenced," evidence was admitted that gates had always been maintained across it by the parties.

3. In *Janesville Cotton Mills v. Ford*, — Wis. —, 52 N. W. Rep. 764, parol evidence was allowed to explain the meaning, in conveyances of a mill privilege, of the phrase "square inch of water," including evidence of the practical interpretation of the parties. The court observed: "It is apparent that the term does not, in the ordinary and usual sense of the words used, convey to the mind any idea of volume. In order to determine what it means, it must receive a construction, and the question is, what is the construction or meaning which must be given to it? On behalf of respondents it is claimed, and the circuit court seems to have followed that view, that the term 'square inch of water' had a definite technical meaning among water engineers and practical mill men from a time anterior to the making of the first conveyance, and that such meaning was the one found by the court, namely, a stream of water with a cross-section area of one square inch, moving with the velocity due to the given head. On the other hand, it is claimed by appellants that the term had no such definite technical meaning at any time, certainly not in the early days of the water power in question, and that the meaning of the term as here used must be sought for and found by considering the circumstances and facts surrounding the various grants and the evidence of the parties as to the meaning intended by the term, and that in the light of such facts and evidence of intention it must be held that the term means the amount of water which will be discharged through an aperture in a flume of the given number of square inches, the center of which aperture is at the given distance below the surface of the water in the flume. For convenience we will call the first the 'theoretical inch'; the second, the 'practical inch'. It appears from the testimony of the

experts that there is a considerable difference between the theoretical and the practical inch. The theoretical inch is certain and unvarying in amount; the practical inch varies in amount according to the construction of the aperture. \* \* \* It is a matter of considerable importance, therefore, which of these meanings is to be applied to the term 'square inch,' as used in the deeds under consideration. It needs no authority to show that if the term had a fixed and definite meaning among hydraulic engineers and mill men at the time it was used, such meaning would prevail, notwithstanding the fact that people ordinarily did not know of such meaning, or even that the parties to the deeds themselves did not know of it. Parties cannot use technical terms with a fixed meaning, and then disclaim such meaning. It is equally clear to our minds that when such alleged technical or trade meaning is an arbitrary one, and not a meaning which the word or words would naturally import, it must clearly appear that the acquired or technical meaning was not the subject of dispute or doubt; that it was well settled and understood, at least among members of the profession or trade which is supposed to use the term in such technical sense." After examining the evidence of experts and of the circumstances, the court continued: "Were we left with the testimony alone on the subject, appellants' contention would indeed be strong. There is however other testimony in the case, which seems to us of greater significance, in the interpretation placed by all the parties then interested upon the terms of their conveyances, and the construction so adopted, while technical and arbitrary, possessed the merit of being definite and certain, capable at all times of being ascertained with mathematical accuracy. It is well settled that the practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract will exercise great and sometimes controlling influence in determining the construction, and such rule is founded upon manifestly just principles. *District of Columbia v. Gallaher*, 124 U. S. 505; *Topliff v. Topliff*, 122 U. S. 121; *Pate v. French*, 122 Ind. 10; *Nilson v. Morse*, 52 Wis. 240; *Hosmer v. McDonald*, 80 Wis. 54. While this rule applies with greatest force to executory contracts, it is by no means confined to that class, and in this case there is furthermore an element partaking of an executory nature in the conveyances, for the water sold is continually being delivered. We have concluded in this case that the construction which the owners of the power for years placed upon the terms

of their grants, it appearing that such construction is reasonable and definite, should and must prevail. We adopt the construction which the parties have adopted, the construction which admits of no doubt as to the amount of water called for, which can always be defined and ascertained with mathematical certainty, and which seems to do justice to all parties in interest, namely, the construction that a 'square inch of water,' as used in the deeds in this case, means what we have termed the 'theoretical square inch.' "

*Limitation:* But such evidence is inadmissible if the language is clear and definite.<sup>1</sup>

*Illustrations:* 1. Thus in *Norton v. Woodruff*, 2 N. Y. 153, the subsequent declarations and conduct of the parties were held inadmissible to show that the contract of a miller to "take" wheat and "give" flour in return, imported a bailment and not a sale. So in *Morss v. Salisbury*, 48 N. Y. 637, where there was a contract in duplicate, unsealed, one part conveying "all the *land* and timber, except the hard wood," and the other "all the *bark* and timber," etc., it was held that there was no intention to convey the land, and that evidence that the price paid was the full value of the land, bark and timber, except the hard wood, was inadmissible. In *Hill v. Priestly*, 52 N. Y. 635, parol evidence was held inadmissible to show that an absolute deed in fee had been treated by the parties and their grantors as granting but an easement. The court said: "It is only where the language of a contract is indefinite that the acts of the parties in carrying it out are received as a practical construction of it; and the evidence tended to show an exception, which, if established, rendered it void as repugnant to the grant."

2. But in *Barker v. Railr. Co.*, 27 Vt. 766, evidence of the acts of the parties was admitted although the contract contained no ambiguous or equivocal terms. The court distinguished between this class of evidence and evidence of contemporaneous conversations, admitting the former "to show how the parties understood their contract, and as a practical construction of it."

## **Sec. 56. Limitation of general rule.**

Evidence under this rule may never be admitted if it is in direct contradiction of the intrinsic meaning of the

<sup>1</sup> *Hill v. Priestly*, 52 N. Y. 635.

*Morss v. Salisbury*, 48 N. Y. 637.

*Albright v. Voorhies*, 36 Hun, 437.

language of the contract, or its meaning as settled by usage and custom.

*Illustrations:* 1. This important distinction is well and sufficiently settled by *The Delaware*, 14 Wall. 579, where it was held that a bill of lading in the ordinary form, imports an obligation to stow the goods under deck, and that evidence is incompetent to show an oral agreement to stow on deck. And in *Gilbert v. Moline Plow Co.*, 119 U. S. 491, it was very curtly held that parol evidence is not admissible to vary a written guaranty, in these words: "We will satisfy all orders G. gives this spring, such as plows and cultivators."

2. In *Palmer v. Albee*, 50 Iowa, 429, parol evidence to explain "twenty acres" of land, in a subscription contract, was rejected. Beck, J., dissenting. And so of "the securities for the deferred payments," in a contract to furnish land.<sup>1</sup> The court said this would not be to apply the terms nor identify the subject-matter, but to supply terms. In *Norris v. Clark*, 33 Minn. 476, the contract conferred the right "to have the sale of my brick in in Fergus Falls during the season of 1883." The court held that this meant "the exclusive right to sell," and that "the oral evidence offered to show such to be the meaning was properly excluded as unnecessary, and "because where the subject-matter is ascertained, we must determine as best we may what the parties intended in regard to it from the language they have selected to express that intention."<sup>2</sup>

3. Where there was a contract to deliver two million brick by two named vessels, beginning June 1st, "vessels to run steadily thereafter," parol evidence was held inadmissible to show a contemporaneous oral agreement not to require more than five hundred thousand a month.<sup>3</sup> "The contract made the carrying capacity of the vessels, steadily employed, \* \* \* the measure of the delivery." Where a contract for carriage of goods by canal boat described the goods, place of shipment and of desti-

<sup>1</sup> *George v. Conhaim*, 38 Minn. 338.

<sup>2</sup> See *Morris' Appeal*, 88 Pa. St. 368.

*Field v. Munson*, 47 N. Y. 221.

*Brawley v. U. S.*, 96 U. S. 168.

*Reed v. Ins. Co.*, 95 U. S. 23.

*Hedges v. Bowen*, 83 Ill. 162.

*County of Des Moines v. Hinkley*, 62 Iowa, 637.

*Burr v. Broadway Ins. Co.*, 16 N. Y. 267.

*Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597.

*Springsteen v. Samson*, 32 N. Y. 703.

*Veazie v. Forsaith*, 76 Me. 172.

<sup>3</sup> *Corse v. Peck*, 102 N. Y. 513.

nation, mode of carriage, name of consignee, price to be paid, and amount to be advanced to the captain, "to be delivered in good order," it was held incompetent to add a parol agreement by defendant to unload the boat at his own cost, except the cost of shoveling the cargo into other vessels.<sup>1</sup> This was put on the ground of contradiction, as is evident from the illustrations of Learned, P. J.

<sup>1</sup> Doty v. Thomson, 39 Hun, 243.

## CHAPTER XIV.

## USAGE.

- SEC. 57. Admissibility of usage to explain terms.  
 58. Admissibility of usage to annex incidents.  
 59. Where usage not provable.

**Sec. 57. Usage to explain terms.**

Extrinsic evidence is admissible in the construction of a mercantile contract, to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by the usage of trade, a peculiar signification, not attaching to them in their ordinary use, and this whether the phrases or terms are in themselves apparently ambiguous or not.<sup>1</sup>

*Unambiguous words—doctrine of Starkie and Stephen:* It has been laid down by two distinguished text-writers that usage is incompetent to explain unambiguous words. Starkie says (Ev. p. 706): “ Merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar carriage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they are plain and ordinary terms and expressions, to which an unequivocal meaning belongs, which is intelligible to all, then it seems that according to the great principle, so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage. It is clear indeed that if a contrary practice were to prevail, and be carried to its full extent, the effect would nearly be to render it impossible to make a special contract in mercantile affairs, and to compel all persons, under all circumstances, to conform to the usages of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what

<sup>1</sup> Wigram Ext. Ev. 57; 2 Pars. Cont. 48, 54.



is the usage; and the very same terms would denote different contracts as often as mercantile fashions varied." And so Stephen (Dig. Ev. art. 91, [2]): "But evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used."

*The earlier cases:* A few of the earlier cases were in this line. Thus in *Yates v. Pym*, 6 Taunt. 446, evidence was rejected to show the meaning of "prime unsinged bacon," and in *Blackett v. Royal Ex. Assur. Co.*, 2 Cr. & J. 244, on an insurance of a ship, her tackle, apparel, boats, etc., evidence of usage that underwriters never pay for loss of boats strung upon the quarter, outside the ship, was excluded. These cases are irreconcilable with many later cases, and the latter case is criticised by Cockburn, C. J., in *Myers v. Sarl*, 3 Ell. & Ell. 316, who says it "goes to the extreme verge of the law," and that evidence was admissible "to show that by general understanding among insurers 'boats' did not mean all boats."

*The later cases:* But this limitation is fully disapproved by the almost uniform course of modern adjudication. Thus, Blackburn, J.: "I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which was to be construed."<sup>1</sup> And Folger, J.: "The meaning of words may be controlled and varied by usage, even when they are words of numbers, length, or space, usually the most definite in language."<sup>2</sup> And Coleridge, J.: "Evidence will not be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning, are used by the contractors in a different sense from that."<sup>3</sup> And Addison, J.: "It is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. This is not to alter the contract, but to show what the contract is."<sup>4</sup>

*Particular words explained by usage:* Custom or usage has been proved to show the meaning of the following words:

<sup>1</sup> *Myers v. Sarl*, 3 E. & E. 306.

<sup>2</sup> *Walls v. Bailey*, 49 N. Y. 464.

<sup>3</sup> *Smith v. Wilson*, 3 B. & Ad. 728.

<sup>4</sup> *Grant v. Maddox*, 15 M. & W. 737.

"inhabitant";<sup>1</sup> "level," as understood by miners;<sup>2</sup> "weeks";<sup>3</sup> "months";<sup>4</sup> "days";<sup>5</sup> "fur";<sup>6</sup> "corn";<sup>7</sup> "pig iron";<sup>8</sup> "freight";<sup>9</sup> "salt";<sup>10</sup> "barrels";<sup>11</sup> "roots," as used in insurance policies;<sup>12</sup> "outfits";<sup>13</sup> "day's work";<sup>14</sup> "wholesale factory price";<sup>15</sup> "after proof and adjustment thereof";<sup>16</sup> "cargo";<sup>17</sup> "sea-letter";<sup>18</sup> "inevitable dangers of the river";<sup>19</sup> "C. O. D." in a contract of carriage by express;<sup>20</sup> "freight measurement";<sup>21</sup> "Michaelmas";<sup>22</sup> "on margin," in a stock contract;<sup>23</sup> so of "port risk";<sup>24</sup> of "current funds";<sup>25</sup> "harbor of New York";<sup>26</sup> "British weight," in a charter party;<sup>27</sup> "spitting of blood," in an application for insurance;<sup>28</sup> "cuts";<sup>29</sup> that "screened coal" does not include nut coal;<sup>30</sup> "weekly account";<sup>31</sup> "keeping a watch";<sup>32</sup> "fire by lightning";<sup>33</sup> "filled in with brick";<sup>34</sup> that "First Nat. La Fayette, Ind.," in a note means a bank.<sup>35</sup>

*Further illustrations:* 1. In *Chaurand v. Angerstein*, Peake, 43, Lord Kenyon admitted proof of usage among commercial men to show that to "sail in the month of October," in an insurance policy, meant not until the 25th. In *Brown v. Byrne*, 77 E. C. L. 702, in regard to the phrase, in a bill of lading, "paying freight for said goods five-eighths of a penny sterling per pound, with five per cent. primage and average accustomed," proof of

<sup>1</sup> *Rex v. Mashiter*, 6 Ad. & Ell. 153.

<sup>2</sup> *Clayton v. Gregson*, 5 Ad. & Ell. 302.

<sup>3</sup> *Grant v. Maddox*, 15 M. & W. 737.

<sup>4</sup> *Jolly v. Young*, 1 Esp. 186.

<sup>5</sup> *Cochran v. Retberg*, 3 Esp. 121.

<sup>6</sup> *Astor v. Union Ins. Co.* 7 Cow. 202.

<sup>7</sup> *Mason v. Skurray*, Park Ins. 245.

<sup>8</sup> *Mackenzie v. Dunlop*, 8 Macq. S. C. 26

<sup>9</sup> *Peisch v. Dickson*, 1 Mason, 11.

<sup>10</sup> *Journu v. Bourdieu*, Park Ins. 245.

<sup>11</sup> *Miller v. Stevens*, 100 Mass. 518; S. C. 1 Am. Rep. 139.

<sup>12</sup> *Coit v. Com. Ins. Co.* 7 Johns. 385.

<sup>13</sup> *Macy v. Whaling Co.* 9 Metc. 354.

<sup>14</sup> *Hinton v. Locke*, 5 Hill, 437.

<sup>15</sup> *Avery v. Stewart*, 2 Conn. 69; S. C. 7 Am. Dec. 240.

<sup>16</sup> *Allegre v. Ins. Co.* 6 H. & J. 408.

<sup>17</sup> *Allegre v. Ins. Co.* 2 G. & J. 137.

<sup>18</sup> *Sleight v. Rhinelander*, 1 Johns. 192.

<sup>19</sup> *Gordon v. Little*, 8 S. & R. 533.

<sup>20</sup> *Collender v. Dinsmore*. 55 N. Y. 200; S. C. 14 Am. Rep. 224.

<sup>21</sup> *Gibbon v. Young*, 8 Taunt. 254.

<sup>22</sup> *Furley v. Wood*, 1 Esp. 198.

<sup>23</sup> *Hatch v. Douglas*, 48 Conn. 116; S. C. 40 Am. Rep. 154.

<sup>24</sup> *Nelson v. Sun Mutual Ins. Co.* 71 N. Y. 455.

<sup>25</sup> *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; S. C. 81 Am. Dec. 284.

<sup>26</sup> *Nelson v. Ins. Co.* 71 N. Y. 453.

<sup>27</sup> *Goddard v. Bulow*, 1 Nott & McCord, 45; S. C. 9 Am. Dec. 663.

<sup>28</sup> *Singleton v. St. Louis Ins. Co.* 66 Mo. 63; S. C. 27 Am. Rep. 321.

<sup>29</sup> *Houghton v. Ins. Co.* 131 Mass. 300.

<sup>30</sup> *Mercer, etc. Co. v. McKee's Admr.* 77 Pa. St. 170.

<sup>31</sup> *Myers v. Sarl*, 30 L. J. (N. S.) Q. B. 9.

<sup>32</sup> *Crocker v. People's Mut. Ins. Co.* 8 Cush. 79.

<sup>33</sup> *Babcock v. Mont. County M. Fire Ins. Co.*, 6 Barb. 637; 4 N. Y. 326.

<sup>34</sup> *Fowler v. Ætna Fire Ins. Co.*, 7 Wend. 270.

<sup>35</sup> *Lane v. Union Nat. Bank.* — Ind. 29 N. E. Rep. 613.

a custom to allow a deduction of three months interest on the freight was approved. Coleridge, J. said: "Neither in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are in the ordinary meaning unambiguous; for the principle of admission is, that words perfectly ambiguous in their ordinary meaning are used by the contractors in a different sense from that." (The dispute was over the sum of £1 16s. 3d.)

2. In *Cochran v. Retberg*, 3 Esp. N. P. 121 (1800), an action for demurrage, parol evidence was received by Lord Eldon, to show that the phrase "to be discharged in fourteen days," in a bill of lading, meant working days, and did not include Sundays nor custom-house holidays.

3. In *Coit v. Commercial Insurance Company*, 7 Johns. 385 (1811), parol evidence was held admissible, to show that *sarsaparilla* was not a "root" within the meaning of a policy of insurance.

4. *Moxon v. Atkins*, 3 Camp. 200 (1812), was an action on a policy of insurance on goods on ship-board, "at and from the ship's lading port or ports in Amelia Island to London." Amelia Island lies near the mouth of the river St. Mary's, and has no port. Further up is Tigre Island, where ships generally took on cargo. Having loaded at Tigre Island, they drop down to Amelia Island, where the Spanish governor lived, and there paid duties and obtained clearances. This course was pursued by the ship in question. It was contended that the policy did not attach, but Lord Ellenborough held, that it was a question for the jury, "whether there had been a loading at Amelia Island, within the meaning of the parties when the policy was effected. Strictly and locally there has been no loading at Amelia Island. But it is possible that in mercantile contracts, Amelia Island may denominate a region in which Tigre Island is comprehended. \* \* \* The question here will be, whether, upon the evidence, this cargo can be said to have been loaded at Amelia Island, according to the usage of such voyages. If it was, the policy attached, although literally speaking, no part of the cargo had ever been upon Amelia Island." The plaintiff had a verdict.

5. *Astor v. Union Insurance Co.*, 7 Cowen, 202 (1827), was an action on an insurance policy on a cargo of *fur*. The policy contained the usual memorandum, by which, among other things, *skins and hides* and all other articles perishable in their own

nature were warranted free from average unless general. The goods were damaged by sea water, owing to wreck, and sold for half-price. The plaintiff offered to show by parol, that by the understanding of the trade in the city of New York, *furs* are not considered to be embraced within the meaning of the term *skins and hides*, the latter being those where the *skin* constitutes the chief value, and the former those whose value is in the *fur*. The evidence was admitted, under objection, and the plaintiff had a verdict for a total loss, which was sustained.

6. In *Allegre's Administrators v. Maryland Insurance Co.*, 2 Gill. and Johns. 136 (1831), an action on a policy of insurance, it was held that evidence was competent to show whether, according to the custom and usage of insurance companies, the word "cargo" would be deemed to cover live stock.

7. In *Barger v. Caldwell*, 2 Dana, 129 (1834), which was an action by an apprentice against his master for failing to teach him his trade, the indenture binding the defendant to teach him the "art and mystery of the tanning business," the question put by the plaintiff whether the apprentice was a good workman in currying leather was held proper. The court say: "The term 'tanning' will include currying or not, in common parlance or in contracts, according to the general practice of any community."

8. In *Smith v. Wilson*, 3 B. and Adol. 728 (1832), parol evidence was admitted to show that the word "thousand," as applied to "rabbits," in a lease, by the custom of the country where the lease was made, denoted twelve hundred. The court say that words denoting quantity are to be understood in their ordinary sense, unless some specific meaning is given to them by statute or custom.

9. In *Clayton v. Gregson*, 4 Nev. and Man. 602 (1835), an action for breach of covenant in a lease of coal mines to get the whole of the veins of coal lying under certain closes "not deeper than or below the *level* of the bottom of the mine," at a certain place, evidence was received to show that by the miners of the neighborhood the word *level* is used in a certain sense, and did not mean *horizontal level*. Littledale, J., says; "I do not think this is a question so much about latent ambiguity as it is about the construction of a word in the English language. I do not think it can be said, that in ordinary language the word "level" invariably means 'horizontal,' or 'horizontal line.' It is like many other words in our language which have various meanings,

according to the subject-matter to which they are applied, *or the parties by whom they are used*. The same word may have twenty different meanings."

10. *Powell v. Horton*, 2 Bing. N. C. 668 (1836), was an action for damages for breach of contract to sell seventy-five barrels of mess pork of Scott & Co., the plaintiff alleging that the pork furnished was not pork manufactured by Scott & Co., and claiming that the contract called for pork of their manufacture; the defendant claiming on the other hand, that the contract was satisfied by pork coming out of the hands of Scott & Co. On the trial evidence was received, under objection, to show that the words "of Scott & Co." were understood in the pork trade to mean "manufactured by Scott & Co." The plaintiff had a verdict which was sustained on review. Ch. J. Tindal, after giving it as his opinion that the words meant "of the manufacture of Scott & Co.," adds: "But admitting that this is left in doubt, in all mercantile contracts on which doubt arises, it is usual to call persons conversant with the trade, to state what is understood by the disputed expression." This view was concurred in by Vaughn and Bosanquet, JJ.

11. In *Schooner Reeside*, 2 Sumner, 569 (1837), Story, J., remarked that parol evidence may "be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified and some technical, according to the subject-matter to which they are applied." But he holds that a usage of packet vessels between New York and Boston, to be liable only for damage to goods caused by their own neglect, cannot be proved as against a bill of lading excepting only dangers of the seas.

12. In *Sampson v. Gazzam*, 15 Ala., 6 Port. 123 (1837), parol evidence received to show that the words "dangers of the river," in a bill of lading, are, by usage and custom of merchants and others, understood to include other casualties than that arising from water. The goods in question were destroyed by fire, probably caused by spontaneous combustion.

13. *Spicer v. Cooper*, 1 Ad. & Ell. 424 (1841), was an action for breach of contract by which the defendant agreed to sell to the plaintiff "18 pockets of Kent hops, at 100s." It appeared on the trial that a "pocket" contained more than 100 cwt., and as the report says, "the defendant proposed to

deliver the hops at 100s. for such pocket ; but the plaintiff offered parol evidence to show that in the hop trade such a contract was understood to mean 100s. per cwt. The defendant's counsel objected to the receipt of this evidence, but the lord chief justice admitted it, giving leave to move for a nonsuit. Verdict for plaintiff on both issues." There seems to be an error in the report. It cannot be that the plaintiff objected to receiving *more* than 1 cwt. for 100s. But at all events the verdict was sustained, Chief Justice Denman remarking: "In this case the contract was either simply 'at 100s.' in which case evidence was admissible to explain in what sense the words are used in the trade ; or it is a perfect contract at '100s. per pocket ;' in which case, evidence is admissible as to the sense in which the trade understand the word 'pocket' so used."

14. In *Evans v. Pratt*, 3 Mann. and Grang. 759 (1842), parol evidence was held admissible to explain the meaning of the words "across a country," in an agreement for a horse race.

15. *Hinton v. Locke*, 5 Hill, 437 (1843), was an action on a contract by which the defendant had promised to pay the plaintiff, who was a carpenter, twelve shillings *per day* for every man employed by him in repairing defendant's house. Parol evidence was held admissible to show that by a universal usage among carpenters, ten hours' labor constituted a *day's work*. So that the plaintiff was entitled to charge *one and one-fourth day* for every twenty-four hours within which the men worked twelve hours and one-half. Bronson, J., said: "Usage can never be set up in contravention of the contract ; but when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates ; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. The evidence often serves to explain or give the true meaning of some word or phrase of doubtful import, or which may be understood in more than one sense, according to the subject-matter to which it is applied."

16. *Grant v. Maddox*, 15 Mees. and Wels. 737 (1846). The plaintiff was an actress ; the defendant a theatrical manager. A contract was made in writing, by which the plaintiff was to perform in the defendant's theater three years at a stipulated sum per week. "On the trial the defendant offered evidence to show

that according to the understanding and custom of the theatrical profession, under an engagement to perform one or more years, actors were never paid during the time of vacation, when the theater was closed, but only during what was called the theatrical season." The plaintiff's counsel objected, on the ground that it went to explain or vary an unambiguous instrument. But the court received the evidence, and the verdict gave effect to it. The plaintiff moved for a new trial on the ground that the evidence was improperly received. On the argument the court refused a new trial, Baron Platt remarking that "the parol evidence amounted to nothing more nor less than translating the contract."

17. *Barton v. McKelway*, 22 N. J. L. 165 (1849), was an action on a contract to deliver a number of *morus multicaulis* trees, of "not less than *one foot high*." It was held that it might be shown that by the universal usage and custom of all dealers in that article, the length was measured to the top of the ripe wood, rejecting the green, immature top. Evidence of the usage was rejected at the trial, and a new trial was granted for that reason.

18. *Stroud v. Frith*, 11 Barb. 300 (1851), was an action by an infant for a breach of covenant for not having taught the plaintiff, an apprentice, the trade of cabinet maker. The covenant in the indenture was to teach the plaintiff the "trade of a cabinet and mahogany door maker." Parol evidence was held admissible to show that this phrase meant only the making of doors of mahogany and ornamental woods. Mitchell, J., observes: "The judge, it is said, went beyond this, and allowed evidence that the plaintiff and his father knew what the business was that the defendant carried on. But the judge allowed this (as his charge showed), not as evidence of what the meaning of the words was, but only to ascertain whether the plaintiff and his father knew of that meaning; and in his charge to the jury he only authorized a verdict in favor of the defendant, if they should find not only that 'the cabinet and mahogany door making' was a *distinct* business in the city of New York, and that the defendant was in that trade, but also that the plaintiff and his father *knew* that the defendant was in that trade." A new trial was denied.

19. In *Gorrissen v. Perren*, 2 C. B. N. S. 681 (1857), it was held, that in an action for breach of a written contract to sell "bales of gambier," parol evidence was proper to prove the meaning of that term by the custom of merchants.

20. In *Lucas v. Bristow*, 96 Eng. C. L. 907 (1858), parol evidence was admitted to show the meaning of the words "50 tons best palm oil," in a contract, and to show that the words were satisfied, in mercantile usage, if the oil delivered contained a substantial portion of "best" oil.

21. In *Williams v. Woods*, 16 Md. 220, (1860), parol evidence of usage was received to explain a memorandum of a sale of goods. The court say: "Although specific and express provisions will control the usage, and exclude any such explanation, yet if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning."

22. In *Miller v. Stevens*, 100 Mass. 518; S. C. 1 Am. Rep. 139, such evidence was admitted to show that "barrel" meant a vessel of certain capacity, and not the statute measure of capacity.

23. In *Soutier v. Kellerman*, 18 Mo. 509, that two packs of shingles were regarded as 1,000, without regard to the actual quantity.

24. In *Merick v. McNally*, 26 Mich. 374, to reject fractions of a foot in measurement.

25. In *Heald v. Cooper*, 8 Me. 32, where logs were sold at a certain price for so much lumber as they are "estimated" to make, to show the general mode of estimation.

26. In *Humphreysville Copper Co. v. Vermont Copper Mining Co.* 33 Vt. 92, where five hundred tons of copper ore were sold, "the moisture to be deducted as usual from the weight of the ore," to show whether the custom was to deduct for moisture before or after the weighing.

27. In *Brown v. Brooks*, 25 Penn. St. 210, where lumber was sold by "the thousand feet," to show that this meant linear measure.

28. In *Pittsburgh v. O'Neill*,<sup>1</sup> 1 Penn. St. 343, it was held that the number of bricks laid in a pavement might by custom be computed by allowing a certain number to the square yard.

29. In *Ford v. Tirrell*, 9 Gray, 401, the case of a contract to build an octangular cellar-way, at a given rate per foot, evidence of a custom to measure cellar walls in a certain way was held competent.

30. In *Mooney v. Howard Ins. Co.* 138 Mass. 375; S. C. 52 Am. Rep. 277, evidence of usage was held competent to show that



"rags" and "old metals," on an insurance of a junk dealer's stock, include, the first, all articles used in manufacturing paper, and the second, old rubbers and old glass.

31. In *Lowe v. Lehman*, 15 Ohio St. 179, the case of a contract to furnish and lay brick at a certain price per thousand, evidence was held competent to show a custom to estimate the quantity by measurement of the walls on a rule based on the size of the brick, making slight additions for extra work and cartage, deducting openings in the walls, but not for chimneys nor jambs. The court said: "We are unable to see anything unreasonable in the custom. The workman was to furnish the bricks and materials and lay them up by the thousand. The contract contains no specifications of the dimensions, shape, angles, or openings or arches of the wall, or of the size of the brick. It does not require a mason to know that the value of the materials depends much upon these, and such like conditions, if they are to be paid for by the numerical thousand. Again the brick are to be furnished as well as laid up. Where and how will you count them numerically? Will you count them at the kiln on the ground, or in the wall? And who will lose the breakage in transportation and in handling, and the waste of filling them into the wall? Some fair measurement of the wall would seem to be a more reasonable method. And we cannot say that this method was not a fair one. It slightly increased the estimated number of bricks in the wall, it is true. \* \* \* All this seems reasonable."

32. In *Walls v. Bailey*, 49 N. Y., 464; S. C. 10 Am. Rep. 407, proof was held competent to show a custom among plasterers to charge for the full surface of walls without deducting for cornices, base-boards, doors or windows. "Evidence of usage," says Folger, J., "is received as any other parol evidence, where a written contract is under consideration. It is to apply the written contract to the subject-matter, to explain expressions used in a particular sense, by particular persons as to particular subjects, to give effect to language in a contract as it was understood by those who made use of it."

33. In *Symonds v. Lloyd*, 6 C. B. (N. S.) 691, where there was a contract to build stone and brick walls, at so much per superficial yard, nine inches thick, evidence was held competent to show a custom to reduce brick-work, for the purpose of measurement, to nine inches, but not to reduce stone-work unless exceeding two feet in thickness.

34. In *Goodrich v. Stevens*, 5 Lans. 230, N. Y. Supreme Court, a contract to buy "a crop of flax," evidence of custom was held admissible to show that among flax dealers "crop" meant not merely what the seller raised but what he bought and controlled.

35. In *Morningstar v. Cunningham*, 110 Ind. 328; S. C. 59 Am. Rep. 211, evidence was admitted to show that the word "products," in the pork-packing business, does not include certain parts of the hogs, and in *Bend v. Georgia Ins. Co.* 1 N. Y. Leg. Obs. 12, to show that "glassware in casks," in an insurance policy, referred only to open casks.

36. So parol evidence has been approved to explain, "300 bales S. F. drills, 7¼; 100 cases blue do. 8¾";<sup>1</sup> "fresh seed";<sup>2</sup> "six per cent. off for cash";<sup>3</sup> to define what articles are "usually kept in country stores," a phrase in an insurance policy";<sup>4</sup> to show that the words "harbor of New York," in an insurance policy, include Tarrytown and other places within the custom house district";<sup>5</sup> to show that a "room" included a loft not divided into rooms;<sup>6</sup> to show that "cider" means the juice of apples as soon as pressed";<sup>7</sup> that "gas fixtures" does not include meters;<sup>8</sup> that oil is "wet" if it contains any water whatever;<sup>9</sup> that on a contract to saw lumber, "spoiled lumber" means such as is rendered unmarketable;<sup>10</sup> that two packs of shingles are regarded as "a thousand";<sup>11</sup> that "one thousand feet in each raft means linear measure."<sup>12</sup>

37. In *Fowler v. Ætna F. Ins. Co.* 7 Wend. 270, where a policy of insurance described a building, in which property insured was contained, as "a frame house filled in with brick," it was held that it was competent for the assured to prove a usage as between insurers and insured, that a house filled in with brick in front and rear, and supported on the one side by a wall of an adjoining house filled in with brick, and on the other by the brick wall of

<sup>1</sup> *Salmon F. M. Co. v. Goddard*, 14 How. 446.

<sup>2</sup> *Ferris v. Comstock*, 33 Conn. 513.

<sup>3</sup> *Linsley v. Lovely*, 26 Vt. 123.

<sup>4</sup> *Pindar v. Kings Co. Ins. Co.* 36 N. Y. 648.

<sup>5</sup> *Petrie v. Phenix Ins. Co.* 132 N. Y. 137.

<sup>6</sup> *Daniels v. Hudson R. F. Ins. Co.* 12 Cush. 416.

<sup>7</sup> *Studdy v. Sanders*, 5 B. & C. 628.

<sup>8</sup> *Downs v. Sprague*, 1 Abb. Ct. App. Dec. 550.

<sup>9</sup> *Warde v. Stuart*, 1 C. B. (N. S.) 88.

<sup>10</sup> *Harris v. Rathbun*, 2 Keyes, 312.

<sup>11</sup> *Soutier v. Kellerman*, 18 Mo. 509.

<sup>12</sup> *Brown v. Brooks*, 25 Pa. St. 210.

an adjoining house, was considered "as a frame house filled in with brick," within the meaning of the policy.

38. In *Page v. Cole*, 120 Mass. 37, there was a sale by writing of "a milk route with all the rights and privileges thereunto appertaining," and "the right and good-will of supplying twenty-six full eight-quart cans of custom." Evidence was held admissible of a custom among persons selling such rights and good-will, to furnish to the purchaser customers whose average daily purchases amount to the number of cans sold. "It was merely as to the mode of doing business in that particular trade, and to show that certain terms, hardly intelligible in themselves, have a recognized and well-known meaning in that special trade."

39. *Fitch v. Carpenter*, 43 Barb. 40 (1864), was an action to recover for hay delivered on a written contract for "merchantable shipping hay." The defendant insisted that the hay did not answer the description, it including clover, and offered to prove that this expression embraced timothy and red-top only. The case does not exactly disclose whether this evidence was objected to, but Miller, J., says: "The question as to what was included or excluded from the terms employed in the contract was on the trial open to evidence for the purpose of showing what was intended by the use of the words employed. It appeared that at the time the contracts were made clover was mentioned as among those kinds of hay answering the description of good, merchantable shipping hay." At all events the reception of this evidence was approved.

40. Custom may show that fire-works and fire-crackers constitute part of stock of "fancy goods and Yankee notion store," in an insurance policy.<sup>1</sup> And on an insurance of a vessel for a "whaling voyage," evidence is competent to show that this covered the taking of sea elephants.<sup>2</sup> And to show whether "all materials and labor for plumbing" included kitchen ranges.<sup>3</sup>

41. In *Myers v. Walker*, 24 Ill. 133, custom was allowed to show the meaning of the word "season" in a contract about corn; and so of "product" in a contract about hogs, in *Stewart v. Smith*, 28 Ill. 397; and to this effect is also *Waechtershauser v. Smith*, 31 N. Y. St. Rep. 552, that "dangers of the river" in an insurance contract, includes other casualties than those arising

<sup>1</sup> *Barnum v. Merch. F. Ins. Co.* 97 N. Y. 188.

<sup>2</sup> *Cassidy v. Fonham*, 38 N. Y. St. Rep. 177.

<sup>3</sup> *Child v. Sun Mut. Ins. Co.* 3 Sandf. 26.

from the water, such as an accidental fire. *Sampson v. Gazzam*, 6 Port. 123. In this case the court said: "Words are but the vehicle of thought, and if by the usage and practice of one class of the community words are used in a sense different from their acceptation among others, not engaged in the same pursuit, it would be the height of injustice to interpret their language by a rule not within their contemplation at the time of making the contract." To the same purport is *Gordon v. Little*, 8 S. & R. 533, in which *Pickering v. Barkley*, 1 Style, 132, was cited, holding the same as to whether a taking by pirates was "a peril of the sea."

42. In *Newhall v. Appleton*, 114 N. Y. 140, custom was proved to show that in a contract for book-canvassing the phrases, "fifteen dollars an order for each and every order" for an encyclopædia issued in volumes, and "four dollars an order" for other publications issued in parts, meant every order under which volumes have been taken and paid for in the first case, and every order upon which ten parts or numbers had been taken and paid for, in the latter.

43. Proof of custom has even been admitted to show that "black is white," as that black selvage is commonly known to the trade as "white selvage."<sup>1</sup>

44. In *Atkinson v. Truesdell*, 127 N. Y. 230, it was held admissible to show that the phrase "to be taken by January 1st, 1883, on dock in New York," in an order for a large quantity of glass bottles, meant in that business as the purchaser should from time specifically order, etc. The court said: "The question thus presented has been the subject of frequent consideration by the courts, and the rule may be regarded as well settled that the meaning of characters, marks, letters, figures, words or phrases used in contracts having purely a local or technical meaning, unintelligible to persons unacquainted with the business, may be given and explained by parol evidence if the explanation is consistent with the terms of the contract. So also parol evidence may be given as to the uniform, continuous and well-settled usage and custom pertaining so the matters embraced in the contract, unless such usage and custom contravene a rule of law, or alter or contradict the expressed or implied terms of a contract, free from ambiguity. By referring to the contract it will be observed that the goods are to be taken by January 1, 1883, on dock in New York. The particular dock is not specified. The goods in question, being glass,

<sup>1</sup> *Mitchell v. Henry*, 15 Ch. Div. 181, the Master of the Rolls dissenting.

require care in shipping and delivering in order that they may not be damaged by breaking. The bottles were bulky and required much space for storage. Storage in New York being expensive, we are told that it was the custom to order the goods from the manufacturer only as they were wanted for use in the business of the purchaser. Hence the custom to be taken when called for. There is nothing in the evidence received that can be said to contravene a rule of law or to contradict the expressed or implied terms of the contract. Under the explanation given as to the usage of the trade, to specifically order the goods from time to time as required by the purchaser, the phrase of the contract, 'to be taken by January 1, 1883, on dock in New York,' is rendered intelligible and harmonious with the other provisions thereof. The question presented may be upon the border, but we are inclined to the opinion that the facts bring it within the rule recognizing the evidence as competent."

45. So in *Smith v. Clews*, 114 N. Y. 190; S. C. 11 Am. St. Rep. 627, plaintiffs, diamond merchants, delivered diamonds to M., upon his receipt for them, "on approval, to show to my customers". It was held that evidence was admissible that in the diamond business the words "on approval" had a recognized meaning, and were not understood to confer a power of sale, but only authority to show the goods to a customer and report to the owner.

46. So in *McCulsky v. Klosterman*, 20 Oreg. 108, it was held that parol evidence was admissible that the phrase "outstanding accounts," in an agreement for a partnership settlement, meant the accounts regarded as collectable, the other accounts having been deducted and charged to profit and loss.

47. In *Redwine v. Side*, — Ala. —; 11 South. Rep. 210, it was held that the meaning of an advertisement to stand a jack for the season, "\$8 to insure or no pay. If mare is sold the money is due at time of sale," may be explained in an action for fees for a mare served and sold before close of the season, by evidence of a general custom in the county for the owner of a stallion to carry during the season a mare put to him without cost if the mare was not with foal, but that the owner of the mare would have to pay for service if she was put only once and traded before the season was over.

48. In *Hugg v. Shank*, 1 Silvernail (N. Y. Supreme Court) 153, it was contended that the ceilings of a building were not so

high as the contract required. The question "in measuring for a nine-foot ceiling, what points do you measure from?" was held proper. This is supported by *Johnson v. De Peyster*, 50 N. Y. 666.

### Sec. 58. Usage to annex incidents.

Parol evidence is competent to annex to a contract a custom or usage of the business and locality, known to the parties, or so general and well settled as to be presumed to be known to them, and with reference to which they must be deemed to have contracted.<sup>1</sup>

*Distinction between explanation of terms and annexation of incidents:* This branch of the law of usage is entirely distinct from that branch upon which proof of usage is admissible to explain expressions used in the writing. The latter is merely explanatory, while this is suppletory. The principle of its admission is well stated in *Humfrey v. Dale*, 7 Eli. & Bl. 266: "The truth is that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of the contract in all its terms, but only those which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and varying incidents which an uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them."

*Early views of this doctrine:* This branch of evidence was at an early day very unpopular among the judges. Story uttered a strong and influential protest against it in *Schooner Reeside*, 2 Sumner, 567; "I own myself no friend to the almost indiscriminate habit of settling up particular usages or customs in almost all kinds of business or trade, to control, vary or annul the general liability of parties under the common law, as well as under

<sup>1</sup> *Doane v. Dunham*, 79 Ill., 131.

*Hughes v. Stanley*, 45 Iowa, 622.

*Smith v. Dann*, 6 Hill, 543.

*Dobbin v. Bradley*, 17 Wend. 422.

*Lee v. Dick*, 10 Peters, 482.

*Howe v. Hardy*, 106 Mass. 329.

*Perkins v. Jordan*, 35 Me. 23.

*Cook v. Welch*, 9 Allen, 350.

*Roberts v. Wilder*, 69 Ga. 340.

*Atwater v. Clancy*, 107 Mass. 369.

*Field v. Lelean*, 6 H. & N. 617.

*Falkner v. Earle*, 3 B. & S. 360.

*Buckle v. Knoop*, L. R. 2 Ex. 125.

*Bottomley v. Forbes*, 5 Bing., N. C. 121.

*Gibbon v. Young*, 8 Taunt. 254.

*Allan v. Sundius*, 1 H. & C. 123.

the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find that of late years the courts of law, both in England and in America, have been disposed to narrow the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character." And in *Bradley v. Wheeler*, 44 N. Y. 495, Earl, Comr., said: "As to the admissibility of usages in general, the later cases show that the dislike to them which seems always to have characterized the ablest judges in this country, and particularly in the State, is now becoming general."

Lord Eldon said (*Anderson v. Pitcher*, 2 B. & P. 168): "Whether however it be not true that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned." So Lord Denman (*Johnston v. Usborne*, 11 Ad. & Ell. 549): "I avow my great reluctance to admit that kind of evidence to vary the effect of any written document."

Lord Denman says (*Trueman v. Loder*, 11 Ad. & Ell. 589): "Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own"; and (*Trueman v. Loder*, 11 Ad. & Ell. 589): "If a legislator were called to consider the expediency of passing a law on this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no

inconvenience in requiring parties making written contracts to write the whole of their contracts; while in mercantile affairs no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous," etc. "The custom fully proved, it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom."

In *Paine v. Smith*, 33 Minn. 495, the court said: "We may say that it is too broad a statement to assert, without qualification, that the modern drift of judicial opinion is in favor of greater latitude in the introduction of proof of usage or custom to explain or construe contracts. In a commercial community many words or phrases acquire a technical meaning, well understood by those in a particular trade or business. Certain business customs and usages also become well established and understood by business men, who in making their contracts assume them, and take them for granted, and contract with reference to them, without taking time to incorporate them into the expressed terms of their bargain. Hence from the necessities of the case arising from such habits, courts are no doubt inclined (and properly so) to greater latitude than formerly in admitting evidence of usage to explain the expressed terms of a contract, and to add to it mere incidents not expressed, but not inconsistent with what is expressed. But courts are still uniformly opposed to allowing evidence of custom to vary or contradict the plain-expressed terms of a contract, or to imply from these terms an obligation different from what the law would imply, or as was in effect sought to be done in this case, to imply an obligation in the absence of any contract on the subject."

But the tendency of the most recent adjudications has been correctly described by Browne (*Usages and Customs*, 72) as follows: "A tendency upon the part of the judges to extend the office of a usage, and while they have been as unwilling to allow a usage to rule express words, they have allowed a usage to supply words and incidents to a written contract which were not inconsistent with it. They too looked to the intention of the parties, but they came to the conclusion that the real drift of these intentions would be better ascertained by a careful regard to the circumstances of the individual at the time of the contract than from a slavish regard only to the written words of the instru-



ment." Baron Maule remarked, in *Robertson v. Jackson*, 2 C. B. 412, that if a party were to contract to transport a lion, evidence would be admissible to show that it was customary to cage such animals.

In a word, the modern doctrine seems to be that the usage of a business forms the basis of any contract in respect to it, and rules its construction, except where it is otherwise provided in the writing. The office of usage in respect to written contracts has been very clearly stated by the Supreme Court of the United States in *Oelricks v. Ford*, 23 How. 63, followed in *Barnard v. Kellogg*, 10 Wall. 383, and *The Delaware*, 14 Wall. 602, as follows: "Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense, different from the sense which they ordinarily import; and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of this kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law." In a celebrated leading case Lord Mansfield held that a custom that the tenant shall have the away-going crop after the expiration of his term is good, if not repugnant to the lease.<sup>1</sup> Lord Mansfield said: "It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is indeed against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The custom does not alter or contradict the agreement in the lease; it only adds a right which is consequential to the taking, as a heriot may be due by custom although not mentioned in the lease."

<sup>1</sup> *Wigglesworth v. Dallison*, 1 Doug. 201; S. C. 1 Smith Lead. Cas. pt. 2, p. 670.

*Illustrations:* 1. The following are leading illustrations of this rule: On a contract of hiring, the custom to allow certain holidays is allowable.<sup>1</sup> To show that all sales in a trade were made by sample.<sup>2</sup> On an engagement at a yearly salary, with a stipulation for increase at the end of the year, a custom to determine the hiring by a month's notice at any time.<sup>3</sup> On a sale of West India rum, the custom to allow warehouse rent to the purchaser.<sup>4</sup> On a sale of goods by a broker in London, to be paid by bill, the custom of the principal to refuse the credit.<sup>5</sup> As to the weight of a cargo, to determine the amount of freight, the custom of the port of delivery.<sup>6</sup> On a contract signed "as agents for merchants," the custom to hold the broker personally unless he disclosed the principal's name within a reasonable time.<sup>7</sup> On a charter party to pay so much per ton for goods shipped at Bombay for London, evidence is competent to show a custom to pay according to measurement at Bombay before loading.<sup>8</sup> So custom is provable to authorize a discount of three months' interest from freights under bills of lading on goods coming from ports in the United States.<sup>9</sup> So custom is admissible, on contracts between brokers for sale of mining shares, to make delivery at the time appointed for payment.<sup>10</sup> So of a custom among ship-brokers that every "introducing broker" should receive a renewed commission on every renewal of a charter effected through him.<sup>11</sup> This was laid down by Bramwell and Martin, Barons, Pollock. C. B., dissenting on the ground that the custom was not one in the ordinary course of business but subject to special agreement. Bramwell, B., said: "A custom may be annexed to documents with which it is not inconsistent," but "such a custom ought to be narrowly watched." On a deposit of wheat with a warehouseman evidence may be given of a custom to store it with other grain in common bins and that the same number of bushels should be regarded as the storer's property, and the warehouseman was not liable for its loss by fire.<sup>12</sup>

<sup>1</sup> Queen v. Stoke-upon-Trent, 5 Q. B. 303.

<sup>2</sup> Syers v. Jonas 2 Exch. 111.

<sup>3</sup> Parker v. Ibbetson, 4 C. B., N. S. 346.

<sup>4</sup> Fawkes v. Lamb, 31 L. J., N. S. Q. B.

<sup>5</sup> Hodgson v. Davies, 2 Camp. 530.

<sup>6</sup> Hudson v. Ede L. R. 2 Q. B. 566, 3 id. 412.

McPherson v. Cox, 86 N. Y. 472.

<sup>7</sup> Hutchinson v. Tatham, L. R. 8 C. P. 482. "

Fleet v. Murton, L. R. 7 Q. B. 126.

<sup>8</sup> Bottomley v. Forbes, 5 Bing. N. C. 121.

<sup>9</sup> Falkner v. Earle, 3 B. and S. 360.

<sup>10</sup> Field v. Lelean, 6 H. & N. 617.

<sup>11</sup> Allan v. Sundius, 1 H. & C. 121.

<sup>12</sup> Hughes v. Stanley, 45 Iowa, 62

2. On a contract to furnish and lay up brick in the wall for a certain price per thousand, evidence was allowed of a custom to measure instead of counting them.<sup>1</sup> So to show that two packs of shingles were counted as a thousand.<sup>2</sup> So to allow a commission merchant to dispose of warehouse receipts for grain, keeping on hand others ready to respond.<sup>3</sup> So to allow a member of a board of trade to sell a customer's property for default of margins.<sup>4</sup> So to show that taking a note at three months for goods, the payment of which is guaranteed upon a credit of that time, is within the guaranty, although the note entitles the debtor to three days of grace.<sup>5</sup> So in respect to an insurance policy, to show a custom to use camphene in printing establishments to clean type.<sup>6</sup> On a contract to employ a broker to sell a ship he may recover commissions from the seller by merely introducing the buyer to him, upon proof of custom to that effect.<sup>7</sup> It is competent to show the custom of average adjusters at a port where a vessel has put in to refit, to treat the expenses of discharging the cargo as general average, but the expenses of warehousing and reshipping the cargo as particular average.<sup>8</sup>

3. On a contract of carriage to show the manner of delivery customary at the destination. On a sale of berries in bags, to show that the sample represented the entire lot and not each bag.<sup>10</sup> On a sale by sample and weight, to show that the weight was to be as already marked on the cases, and not by weight at the time of sale.<sup>11</sup> Where the charter party is silent, to determine the commencement of lay-days by the usage of the port.<sup>12</sup> On a purchase of wheat, to supply time and place of payment.<sup>13</sup> On a sale of "first quality clean barley," to show that delivery was to be made in sacks.<sup>14</sup> On a contract to buy goods of a manufacturer of them, to show that they were to be of his own make.<sup>15</sup>

<sup>1</sup> *Lowe v. Lehman*, 15 Ohio St. 179.

<sup>2</sup> *Soutier v. Kellerman*, 18 Mo. 509.

<sup>3</sup> *Bailey v. Bensley* 87 Ill. 556.

<sup>4</sup> *Corbett v. Underwood* 83 Ill. 324.

<sup>5</sup> *Smith v. Dann*, 6 Hill 543.

<sup>6</sup> *Harper v. City Ins. Co.* 1 Bosw. 520.  
*Citizens' Ins. Co v. McLaughlin*, 53  
Pa. St. 485

*Cook v. Welch* 9 Allen, 350.

<sup>8</sup> *Atwood v. Sellar*, 5 Q. B. Div. 286.

<sup>9</sup> *Richmond v. Union St. Co.* 87 N. Y.

*Farmers', etc., Bank v. Champlain, etc.,*  
Co. 18 Vt. 131.

*Irish v. Railroad Co.* 19 Minn. 376.

*N. Y. Cent., etc., R. Co. v. Standard Oil*  
Co. 87 N. Y. 486.

<sup>10</sup> *Schnitzer v. Print Works*, 114 Mass.  
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<sup>11</sup> *Jones v. Hoey*, 128 Mass. 585.

<sup>12</sup> *Barke v. Borzone* 48 Md. 474.

<sup>13</sup> *Mand' v. Trail* 92 Ind. 521; S. C. 47  
Am. Rep. 163.

<sup>14</sup> *Robinson v. U. S.*, 13 Wall. 363.

<sup>15</sup> *Johnson v. Raylton*, 7 Q. B. Div. 438.

*Loveland v. Burke*, 120 Mass. 139.

4. On the question of due diligence of a carrier in shipping potatoes from New York to Belfast, evidence was held admissible to show a custom at New York to ship them to Liverpool or Glasgow and there to reship them to Belfast, as the usual and most expeditious manner.<sup>1</sup> A general custom of insurance companies has been allowed to be proved to bind them to accept premiums after they are due.<sup>2</sup> Where a lease is from a day named, proof of a local custom that it begins and ends at noon is admissible.<sup>3</sup>

5. To show that under a contract to build a draw-bridge, it is the common understanding in the business that it must be capable of being easily turned in two or three minutes by one man.<sup>4</sup> To charge interest.<sup>5</sup> For manufacturers to pay freight on goods sold and shipped.<sup>6</sup> For buyers of beer in the spring to have right to return what remained unsold at the end of the season.<sup>7</sup> A contract for the excavation of a city lot being silent as to whom the sand should belong to, proof was allowed of a custom that it belonged to the excavator and not to the owner of the lot.<sup>8</sup> Proof of a custom to allow the tenant the away-going crop is admissible, although the lease gives no such right.<sup>9</sup> In an action on contract by telegram for purchase of wheat by merchants in Baltimore from merchants in this State, there being no stipulation for time and place of payment, evidence is admissible to show a custom among merchants in the State for payment to be made in Baltimore upon arrival of the wheat.<sup>10</sup>

6. A firm of ship-brokers signed a charter-party in the form "by telegraphic authority" of the charterer "as agents." Evidence was admitted to explain the effect of the form of signature, and that it was commonly adopted to negative the implication of any further warranty by the agent than that he had received a telegram, which, if correct, authorized the charter.<sup>11</sup> A quantity-surveyor was employed by an architect to take out

<sup>1</sup> McKay v. New York, etc., R. Co. 50 Hun, 563.

<sup>2</sup> Girard Life Ins. Co. v. Mut. Life Ins. Co. 36 Pa. St. 236.

Baxter v. Massasoit Ins. Co. 13 Allen, 320.

Contra. Busby v. N. A. Life Ins. Co. 40 Md. 572.

Mut. Ben. Life Ins. Co. v. Ruse, 6 Ga. 534.

<sup>3</sup> Wilcox v. Wood, 9 Wend. 346.

<sup>4</sup> Railroad Co. v. Smith, 21 Wall. 262.

<sup>5</sup> Esterly v. Cole. 3 N. Y. 502.

<sup>6</sup> Howe v. Hardy 106 Mass. 329.

<sup>7</sup> Meldrum v. Snow, 9 Pick. 441.

<sup>8</sup> Cooper v. Kane, 19 Wend. 386.

<sup>9</sup> Stultz v. Dickey, Binney, 285.

<sup>10</sup> Mand v. Trail 32 Ind. 521, S. C. 47 Am. Rep. 163.

<sup>11</sup> Lilly v. Smales, 1892, 1 Q. B. Div. 456.

quantities for a building; a builder tendered for the work upon a specification which embraced the clause: "To provide for copies of quantities and plans, 25 guineas to be paid to the surveyor out of the first certificate;" his tender was accepted, and he received the first installment of the price from the owner. In a suit by the surveyor against the builder for the 25 guineas, evidence was allowed of a usage that the builder whose tender was accepted was liable to the surveyor for the amount due for the quantities, but if no tender was accepted the building-owner or architect was liable.<sup>1</sup> Where a railroad company accepted goods addressed to a point beyond its terminus, and gave a bill of lading for carriage to its terminus, evidence was admitted of a custom to deliver to a connecting carrier.<sup>2</sup>

7. In *Richmond v. Union Steamboat Co.*, 87 N. Y. 240, the court approved proof of a custom at Buffalo, that when grain was shipped in the same vessel to different consignees, each was at liberty to designate the elevator for the discharge of his portion, and the carrier was bound to discharge it there.

8. In *Sims v. United States Trust Company*, New York Supreme Court, 35 Hun, 533, there was deposited with the defendant corporation by Crowell, an agent of J. Marion Sims, a check for \$5,000, drawn by the said Sims to the order of the defendant corporation. A certificate of deposit was issued by the defendant acknowledging the receipt of the said amount from Crowell, in trust for J. Marion Sims, and making it payable to Crowell in trust. Crowell having subsequently drawn out the money and converted it to his own use, this action was brought by Sims' executor to recover the amount so deposited. Upon the trial the defendant, to escape being charged with notice of Sims' ownership of the money by reason of the form of the check, offered to prove "a well-established commercial custom, existing for many years throughout the United States, whereby banks and trust companies and other financial institutions, in the absence of a restrictive indorsement, accept as cash checks drawn to their own order, and deposit or apply the same as directed by the persons presenting such checks." *Held*, that the court erred in refusing to admit proof of such custom. The court observed: "It is contended by the learned counsel for the plaintiff that this custom overrides the law, but this does not so clearly appear. It is true that custom and usage are not permitted to have effect

*North v. Barrett*, 1892, 1 Q. B. Div. 333.

<sup>2</sup> *Hooper v. Chicago R. Co.* 27 Wis. 81.

when they contravene any established rule of law. 2 Greenl. Ev., sec. 246. And that usage cannot alter the law. *Thompson v. Riggs*, 5 Wall. 663, 980. And further, that 'a clear, certain and distinct contract is not subject to modification by proof of custom. Such a contract disposes of all customs and practices by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined.' *Simmons v. Law*, 3 Keyes, 217. It is true also that usage is admissible to explain an ambiguity, but it is never received to contradict what is plain in a written contract, although this is a repetition in another form of the doctrine already expressed. *Collender v. Dinsmore*, 55 N. Y. 208; *Barnard v. Kellogg*, 10 Wall. 383, 391; *Bradley v. Wheeler*, 44 N. Y. 495; *Walls v. Bailey*, 49 id. 464; *Wheeler v. Newbould*, 16 id. 392. But these rules are not applicable to the transaction in question, for the reason that the contract is not expressed in the instrument by which the deposit was made. It is a direction to the People's Bank to pay to the defendant a certain sum of money, whether for the benefit of the holder or the drawer does not appear from the contract itself, although, as already suggested, the fair inference is that it was intended as a transfer from one depository to another, and although the purpose of such transfer, it must be conceded, was not expressed, and does not appear, inferentially or otherwise. The transaction is however converted into a well-understood contract by force of the usage, if it existed as asserted by the defendant, for the reason that the presenter has the right under its efficacy to require the application of it as he desires. The language employed in the case of *Walls v. Bailey*, *supra*, elucidates and controls. It is there said 'every legal contract is to be interpreted in accordance with the intention of the parties making it.'"

*Character of the usage:* "A custom or usage which binds the parties to a contract does so only upon the principle either that they have knowledge of its existence, or that it is so general that they must be supposed to have contracted with reference to it.<sup>1</sup> It must be shown that the parties are all engaged in the business in question and are within the sphere of operation of the usage.<sup>2</sup> The usage is not binding if one of the parties is unfamiliar with

<sup>1</sup> *Harris v. Tumbridge*, 83 N. Y. 92.

<sup>2</sup> *Barker v. Borzone*, 48 Md. 474.

*Soutier v. Kellerman*, 18 Mo. 509.

*Ripley v. Ætna Ins. Co.* 30 N. Y. 136.

the trade or the locality.<sup>1</sup> The requisites of the proof of knowledge of the custom are well stated in *German-Am. Ins. Co. v. Com. F. Ins. Co.* — Ala. —; 11 So. Rep. 117, in which it was held that a custom among underwriters in New York city to class certain stores as distinct buildings for purposes of insurance, and to insure them severally as separate risks, is not binding on an insurance company domiciled in Alabama, without proof that the latter had knowledge of such custom when a contract was made with another company for reinsurance in that city. The court observed: "While it is well settled at this day that the existence of a usage in respect of the subject-matter of a contract may have the effect of giving to its terms definitions which would not otherwise attach to them, the doctrine rests, except in particular instances, solely upon the theory that the parties in entering into the compact had such usage in mind, stipulated with reference to it, and hence made it a part of their contract; and whether a usage, in a given case, is thus to be taken as a part of the contract, whether the parties had it in view in their negotiations, and intended that their agreement should be read and construed with reference to and in the light of such usage, is always a question of fact. And as in the nature of things, no man can be said to have contracted with reference to a fact—to have had a fact in mind—of which he was ignorant, usage relied on by one party to give color to the obligations of another, or to impose a liability which does not arise on the ordinary meaning of the terms of their contract, must be shown to have been known to such other party. This is usually done by proof of an established usage, certain, uniform and reasonable in character, and of such general acceptance, and consequent notoriety, as that a *prima facie* presumption of knowledge of it on the part of him who is sought to be affected by it arises, and un rebutted, affords the predicate for the further presumption, of a conclusive nature, that he considered it in the particular dealing to which it is incident, and made it as much a part of his contract as if it had therein been specifically referred to. In the case at bar the *onus* was on plaintiff to prove, not only that the usage relied on had been established and existed at the time of the contract, but also that the defendant had knowledge of it, and there-

<sup>1</sup> *Walls v. Bailey*, 49 N. Y. 464.  
*Abbott v. Bates*, 43 L. J., N.S.C.P. 150.  
*Bentley v. Doggett*, 51 Wis. 224.  
*Gaboy v. Lloyd*, 3 B. & C. 793.

*Buckle v. Knoop*, L. R. 2 Ex. 125.  
*Southw. Freight Co. v. Stanard*, 44 Mo. 71.  
*Jones Const. Cont.* sec. 115.

fore is to be holden to have contracted with reference to it. There is no direct evidence of such knowledge. The inference of knowledge is sought to be rested alone on proof of the establishment, existence and prevalence of the usage in the city of New York. Had both contracting parties been domiciled in that city, and entered into a reinsurance compact solely with reference to risks located there, there would be some ground to say that defendant would be held *prima facie* to a knowledge of the usage. But the domicile of defendant was in Alabama, and the reinsurance compact contemplated and provided for the taking of risks, not only in the city of New York, but throughout the country. Not only so, but the correspondence between the parties demonstrates that risks were actually incurred under the compact in a number of other towns and cities. It cannot be supposed that the Commercial Company had knowledge of the local usages incident to the business of insurance in each of these numerous localities, and so contracted with reference to them that its obligations, expressed in clear and unambiguous terms, imported a liability for one sum on a given state of facts in New York city, another sum on the same facts in Brooklyn, another in Litchfield, Conn., yet another in Chicago, and so on *ad infinitum*. The law to the contrary is well settled that proof of such local usages will not raise up a presumption of a knowledge of their existence on the part of one engaged generally in the business to which they pertain in a certain city, at least where the domicile of the party sought to be charged is elsewhere; or in other words, that in order to create even a *prima facie* presumption that a party has knowledge of a usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, in such sort as that it would be unreasonable to suppose he was ignorant of it. This plaintiff has failed to do. No general usage is proved, or attempted to be proved, and the defendant cannot be held beyond the terms of its compact dissociated from any effect the alleged usage is claimed to have upon those terms. *Cobb v. Ins. Co.*, 58 Me. 326; *Lawson Usages & Cust. secs. 17, 25-27*; *Hill v. Ins. Co.* 10 Hun, 26; *Railroad Co. v. Johnston*, 75 Ala. 596; *Smith v. Rice*, 56 Ala. 417; *Herring v. Skaggs*, 73 Ala. 446; *Bradley v. Wheeler*, 44 N. Y. 495; *Child v. Ins. Co.*, 3 Sandf. 26; *Walls v. Bailey*, 49 N. Y. 464; *Higgins v. Moore*, 34 N. Y. 417. The presumption of knowledge of an established usage, which arises upon proof of its generality in the



business or trade to which it is incident, is, as we have indicated, generally speaking, only *prima facie*, and hence rebuttable by direct evidence of a want of such knowledge. *Walls v. Bailey, supra*. With reference to contracts of insurance there is this exception to the doctrine just stated: that insurance companies are under such a duty to inform themselves of the usages of the particular business insured as that they will not be heard to deny such knowledge. This only means however that where a general usage in business is proved, a usage of the character that raises up the *prima facie* presumption or knowledge in ordinary cases, the insurer, in view of the duty resting on him to acquaint himself with the general usages of the business, will not be let in to rebut the presumption, which in consequence becomes a conclusive one as to him. But an insurer is no more bound than any other party by proof of usages obtaining to a greater or less extent, territorially or otherwise, in respect of the business insured, which are not general in their nature, but obtain only in certain localities, or not substantially in all instances of the particular business. So that if it were conceded here that had the proof established the New York city usage in question as incident to the insurance business generally throughout the territory contemplated in this reinsurance compact, the defendant would not be heard to assert its ignorance of it, or to deny that it contracted with reference to it, yet the predicate for this *quasi* estoppel is wholly lacking, in that the proof adduced is not of such general usage, but only of one that is local and peculiar to the city of New York—a particular usage or custom, the existence of which raises no presumption at all that defendant had knowledge of it. *Lawson Usages & Cust. secs. 17, 19, 26.* See also *Robinson v. Mollett*, L. R. 7 H. L. 802; *Scott v. Irving*, 1 B. & Ad. 605. "People in Liverpool may well be supposed to be ignorant of rules in existence on the other side of the world at Sidney."<sup>1</sup>

*Individual usage:* Where a person has adopted special modes of transacting business, or uses words in a peculiar sense, and this is known to and understood by those with whom they deal, their agreement will be construed with reference thereto, and their former dealings may be proved to show acquiescence therein.<sup>2</sup>

<sup>1</sup> *Kirchner v. Venus*, 12 Moore P. C. 361.

<sup>2</sup> *Jones Const. Cont.*, § 112.

*Warren Bank v. Parker*, 8 Gray, 221.

*Marrett v. Brackett*, 60 Me. 524.

*Fabbri v. Phoenix Ins. Co.*, 55 N. Y. 129.

*Grinnell v. West. Union Tel. Co.*, 113 Mass. 299.

Evidence is admissible of a particular custom of dealing as between the parties, although it may substitute a limited written agreement for a broader implied oral one. As where a carrier accepts goods without delivery of a bill of lading, and afterwards delivers a bill limiting his common-law liability, this will operate as a valid limitation accordingly, if such has been the custom of the parties.<sup>1</sup>

### Sec. 59. When usage not provable.

Evidence is inadmissible to prove a custom or usage that is vague, inconclusive, unreasonable or absurd, or that varies an express agreement, or infringes a sound rule of law.<sup>2</sup>

Stewart v. Aberdeen, 4 M. & W. 211.  
 Robinson v. Mollett, L. R., 7 H. L. 802.  
 Renner v. Bank of Columbia, 9 Wheat. 582.  
 East Tenn., etc., R. Co. v. Johnston, 75 Ala. 596; S. C. 51 Am. Rep. 489.

Johnston v. Bank, 101 Pa. St. 600.  
 Green v. Milwaukee, etc., R. Co., 38 Iowa, 100.  
 Bridgeport Bank v. Dyer, 19 Conn. 136.  
 Brown v. Kough, 52 L. T. Rep. (N. S.) 878.  
 Bourne v. Gatcliff, 11 Cl. & F. 45.

<sup>1</sup> Perry v. Thompson, 98 Mass. 249.

<sup>2</sup> Nat. Bank v. Burkhardt, 100 U. S. 686.

Barnard v. Kellogg, 10 Wall. 383.

Ins. Co. v. Wright, 1 Wall. 470.

Rankin v. Am. Ins. Co., 1 Hall, 619.

Groat v. Gile, 51 N. Y. 431.

Pindar v. Cont. Ins. Co., 36 N. Y. 648.

Frith v. Barker, 2 Johns. 327.

Vail v. Rice, 5 N. Y. 155.

Woodruff v. Merch. Bank, 25 Wend. 673, 674.

Dykers v. Allen, 7 Hill, 499.

McKim v. Aulbach, 130 Mass. 481; S. C. 39 Am. Rep. 470.

Jones v. Hoey, 128 Mass. 585.

Davis v. Galloupe, 111 Mass. 121.

Snelling v. Hall, 107 Mass. 134.

Potter v. Smith, 103 Mass. 68.

Dickinson v. Gay, 7 Allen, 29.

Greenstine v. Borchard, 50 Mich. 434; S. C. 45 Am. Rep. 51.

Sohn v. Jarvis, 101 Ind. 578.

Franklin Life Ins. Co. v. Sefton, 53 Ind. 380.

Spears v. Ward, 48 Ind. 541.

Bailey v. Bensley, 87 Ill. 556.

Corbett v. Underwood, 83 Ill. 324.

Smyth v. Ward, 46 Iowa, 339.

Randolph v. Halden, 44 Iowa, 327.

Marks v. Cass Co. Mill Co., 43 Iowa, 146.

Randall v. Smith, 63 Me. 105.

Polhemus v. Heiman, 50 Cal. 438.

Cooke v. England, 27 Md. 14.

Wetherill v. Neilson, 20 Pa. St. 448.

Coxe v. Heisley, 19 Pa. St. 247.

Schenck v. Griffin, 38 N. J. L. 462.

Phoenix Ins. Co. v. Taylor, 5 Minn. 492.

Spartali v. Benecke, 10 C. B. 212.

Blackett v. Royal Ex. Ass. Co. 2 Cr. & J. 244.

Hall v. Janson, 4 El. & Bl. 500.

Cockburn v. Alexander, 6 C. B. 791.

Hayton v. Irwin, L. R., 5 C. P. Div. 134.

Odiorne v. N. E., etc., Ins. Co., 101 Mass. 551.

Security Bank v. Nat. Bank, 67 N. Y. 458; S. C. 23 Am. Rep. 129.

*Illustrations:* 1. As of a custom of real estate brokers to charge commissions to both parties.<sup>1</sup> Or that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold without inquiry.<sup>2</sup> Or on a contract to make a "satisfactory" suit of clothes, of a custom to try on the garments after they were finished, and then to alter if necessary.<sup>3</sup> Or to show that a miller's receipt for wheat imported a sale and not a bailment.<sup>4</sup> Or to reject an undisclosed principal and look to the broker who signed as broker.<sup>5</sup> Or a custom of London corn factors to sell in their own name.<sup>6</sup> In *Odiorne v. N. E., etc., Ins. Co.*, 101 Mass. 551, by a policy of insurance the insured vessel was "prohibited from" certain waters and ports between certain dates. Evidence of the oral statement of the president at the issuing of the policy, that a violation would not avoid the policy, and of custom to that effect, was excluded. In respect to a marine policy, evidence is not admissible of a usage, before liability attaches, to exact a port-warden's survey certifying that the goods were properly stowed, and were damaged by the perils of the sea in transit.<sup>7</sup> Oakley, J., said: "It would be creating a condition precedent to the plaintiff's right of recovery, where the contract itself expresses none," and would be "unreasonable," because not made conclusive nor even evidence. A local custom to require a lessor to cleanse a house before the lessee takes possession, is inadmissible.<sup>8</sup> So of a usage among undertakers to charge to each funeral "the entire cost of certain articles of funeral feature."<sup>9</sup> So of a usage that if one broker merely introduces another broker to a ship-owner who subsequently transacts business with him, the first is entitled to a commission thereon.<sup>10</sup>

2. In *Collender v. Dinsmore*, 55 N. Y. 200; S. C. 14 Am. Rep. 224, it was held inadmissible to show a custom among connecting express companies transporting goods marked "C. O. D.," to transfer the goods with the bill to the succeeding company and await return of proceeds. Allen, J., said: "Custom and usage is

<sup>1</sup> *Raisin v. Clark*, 41 Md. 158; S. C. 20 Am. Rep. 66.

<sup>2</sup> *Shaw v. Spencer*, 100 Mass. 382; S. C. 1 Am. Rep. 115.

<sup>3</sup> *Brown v. Foster*, 113 Mass. 136; S. C. 18 Am. Rep. 463.

<sup>4</sup> *Wadsworth v. Allcott*, 6 N. Y. 64.

<sup>5</sup> *Trueman v. Loder*, 11 Ad. & Ell. 589.

<sup>6</sup> *Johnston v. Usborne*, 11 Ad. & Ell. 549.

<sup>7</sup> *Rankin v. Am. Ins. Co.*, 1 Hall (N. Y. Super.) 619.

<sup>8</sup> *Sawtelle v. Drew*, 122 Mass. 228.

<sup>9</sup> *Paxton v. Courtney*, 2 F. & F. 131.

<sup>10</sup> *Gibson v. Crick*, 31 L. J., N. S. Ex. 304.

resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. But the incident sought to be imparted into the contract must not be inconsistent with its express terms or any necessary implication from those terms. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract. \* \* \* There was no evidence of any usage which could add to, vary, or affect in any way, the meaning of the words, 'from Turner's Express Company, Boston.' That is to say, if those words had not been present, and 'C. O. D.' had stood alone, the evidence would have been competent.

3. So in *Randall v. Smith*, 63 Me. 105; 18 Am. Rep. 200, where a contract was made whereby defendant agreed to carry for plaintiff a cargo of coal from New York to Portland at a fixed price, which cargo plaintiff agreed to furnish. *Held*, that defendant could not excuse a breach by him of the contract by showing that by the usage at Portland such an agreement is treated as a permit to the vessel to load with coal, if the master finds it convenient, but if not, he may throw up the order without incurring liability for damage; and likewise the shipper may decline to furnish the coal, such usage being repugnant to the contract and contrary to law. And in *Rogers v. Woodruff*, 23 Ohio St. 632; S. C. 13 Am. Rep. 276, on sales of goods "to arrive by" a certain time, it was held that evidence that by the custom of merchants those words mean "deliverable by" that time was inadmissible, for the words do not import any warranty that the goods shall arrive by that time. So in an action against a telegraph company for a mistake in sending a message, evidence of a usage in a local office of the company is inadmissible to vary the terms of the contract under which the message is sent.<sup>1</sup> So as to the word "settlement" in a mercantile contract, *Susquehanna F. Co. v. White*, 66 Md. 444; S. C. 59 Am. Rep. 186, evidence of a local usage to attach "a peculiar meaning" to it was rejected. This

<sup>1</sup> *Grinnell v. Western Union Tel. Co.* 113 Mass. 299; 18 Am. Rep. 485.

was on the ground that "it was not stated what that peculiar meaning was," and "a court must know what a usage is before it can safely admit evidence of its existence"; and the court would not have it understood that proof of usage is never admissible to explain the meaning of words.

4. In *Silberman v. Clark*, 96 N. Y. 522, it was held that a contract to deliver steel "free on board" vessels, might not be varied by proof of custom that it should be subject to inspection-fees. This may be said to be a case of absolute contradiction and not of explanation, and so distinguishable from *Brown v. Byrne*, 3 Ell. & Bl. 703. The case was not much considered, no authorities were cited, the court merely saying "the meaning of the language used cannot be changed or varied by proof of any custom," and the rails could not be "free on board if they were to be subjected to the expenses of inspection." So in *Willmerling v. McGaughey*, 30 Iowa, 205; S. C. 6 Am. Rep. 673, an action upon a written contract for the sale of hogs, "to be delivered by giving ten days' notice at any time in June," parol evidence was held inadmissible to show how such contracts were understood by stock dealers, that the contract obliged defendant to deliver during that month without notice, and that giving notice was at plaintiff's option. This was put on the ground that the language was unambiguous, not new, technical nor peculiar, but plain and common, and that the proof would absolutely contradict its ordinary and popular meaning. So on a contract to pay "freight measurement," evidence was excluded of a custom to require before payment an account from the plaintiff and to deliver the measurement.<sup>1</sup>

5. Custom has been held inadmissible to show that on a sale of sheep the wool did not go to the purchaser.<sup>2</sup> Where there was a sale of "a lot of canal oats, say about four thousand bushels, more or less," evidence that by custom the phrase "more or less" was meant to provide for a variation of not above five per cent. was excluded.<sup>3</sup> So to deny days of grace on a bill of exchange.<sup>4</sup> To allow brokers to pledge or dispose of collateral stocks at pleasure, returning an equal number of shares of the same kind.<sup>5</sup> Where articles for a whaling voyage authorized the master to displace any officer or seaman deemed by him incompetent, and

<sup>1</sup> *Gibbon v. Young*, 8 Taunt. 254.

<sup>2</sup> *Groat v. Gile*, 51 N. Y. 431.

<sup>3</sup> *Vail v. Rice*, 5 N. Y. 155.

<sup>4</sup> *Woodruff v. Merch. Bank*, 25 Wend. 673.

<sup>5</sup> *Dykers v. Allen*, 7 Hill, 499.

reduce his lay, substituting another person, it was held incompetent to show a usage never to disrate an officer to a seaman, but instead to discharge him.<sup>1</sup> Where there was a contract for sale of coal to be shipped between June 11th and Sept. 1st, "at the plaintiff's option," and he called for it on August 24th, it was held incompetent to show a usage of the part of shipment, to require the option to be given in season to allow the coal to be shipped between the dates named.<sup>2</sup> On a contract to cut stone for a building according to certain plans, usage was held incompetent to show that the owner of the building was to pay for the necessary wooden patterns.<sup>3</sup> On a contract to sell and ship potatoes, evidence is not admissible to show a custom to ship not to the purchaser, but to the seller himself.<sup>4</sup> Evidence was held inadmissible to show the defendant's custom to receive premiums after they were due.<sup>5</sup> On a contract to deliver "fat, smooth and merchantable steers, three and four years old, to average twelve hundred pounds gross weight, none to weigh less than one thousand pounds," evidence of a custom attaching a different meaning was excluded.<sup>6</sup> So of a contract to "clear out the field."<sup>7</sup>

6. Where a receipt to Vance was given for a note of \$600, "which note, if discounted at said bank, five hundred dollars is to be applied to said Vance's credit" with a specified firm, evidence was held inadmissible to show that the note was payable unconditionally.<sup>8</sup> A receipt for corn, "subject to storage," stating the quantity but no price, may not be shown to be by custom a sale rather than a bailment.<sup>9</sup> A lease of a coal mine stipulating to leave the mine in good working order, a custom to remove the supports and pillars of coal may not be shown.<sup>10</sup> A contract for railroad ties providing that they would be inspected and accepted or rejected "when being distributed on the road-bed in advance of the track," it was held that custom was not provable to show an acceptance by a preliminary inspection and marking.<sup>11</sup> Custom cannot vary the effect of an agreement to deliver "in good order."<sup>12</sup> Nor construe a contract to ship and carry freight as binding only at the convenience of either party.<sup>13</sup> A carrier on

<sup>1</sup> Potter v. Smith, 103 Mass. 68.

<sup>2</sup> Snelling v. Hall, 107 Mass. 134.

<sup>3</sup> Davis & Galloupe, 111 Mass. 121.

<sup>4</sup> Sohn v. Jervis, 101 Ind. 578.

<sup>5</sup> Franklin L. Ins. Co. v. Sefton, 53 Ind. 380.

<sup>6</sup> Spears v. Ward, 48 Ind. 541.

<sup>7</sup> Harper v. Pound, 10 Ind. 32.

<sup>8</sup> Stone v. Vance, 6 Ham. (Ohio) 246.

<sup>9</sup> Marks v. Cass Co. etc. Co., 43 Iowa, 146.

<sup>10</sup> Randolph v. Halden, 44 Iowa, 327.

<sup>11</sup> Smyth v. Ward, 46 Iowa, 339.

<sup>12</sup> Polhemus v. Heiman, 50 Cal. 438.

<sup>13</sup> Randall v. Smith, 63 Me. 105.

the Pennsylvania canal may not set up a usage exempting him from liability for injury by dangers of navigation, fire, or unavoidable accident.<sup>1</sup> Where a note is given for a horse, evidence is not receivable of a custom to allow the purchaser time to try the horse before the sale becomes absolute.<sup>2</sup> In case of an ordinary marine insurance, custom may not defeat the liability, on money advanced for freight, to make good a general average.<sup>3</sup> Where a contract for sale of goods stipulated for a credit of a month, evidence was excluded to show a custom not to deliver without payment.<sup>4</sup> Evidence is not admissible of a custom of shippers and insurers to regard the expression, "not below A 2," in open policies, as referring to the rate of vessels, or the register of the insured vessels.<sup>5</sup> So under a charter-party for a cargo of wool, at specified prices of freight for pressed and unpressed wool, it was held inadmissible to show a custom to impose the cost of pressing on the ship-owner.<sup>6</sup> So where notes of a third party were transferred in payment for goods, custom was excluded to show that the transferor incurred the liability of an indorser.<sup>7</sup> Evidence of the conversation of the parties and of the custom of insurance companies, was held inadmissible to show that the word "epidemics" in a life insurance permit to travel, included yellow fever.<sup>8</sup> Freedman, J., observed: "It is also true that the rule referred to is directed only against the admission of any other evidence of the *language* employed by the parties in making the agreement than that which is furnished by the writing itself, and that the writing may be read by the light of the surrounding circumstances. But this is permitted only for the purpose of finding out the true sense of the written words as the parties used them. \* \* \* Unless therefore the terms of the written instrument have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context points out that in the particular instance, and in order to effectuate the intention of the parties, they should be understood in a peculiar sense, they are to be understood in their plain, ordinary and popular sense. \* \* \* The word 'epidemics' in the permit is not shown to have been used in the peculiarly medical sense attributed to it by the learned

<sup>1</sup> *Coxe v. Heisley*, 19 Pa. St. 243.

<sup>2</sup> *Schenck v. Griffin*, 38 N. J. L. 462.

<sup>3</sup> *Hall v. Janson*, 4 El. & Bl. 500.

<sup>4</sup> *Spartali v. Benecke*, 10 C. B. 212.

<sup>5</sup> *Ins. Cos. v. Wright*, 1 Wall 456.

<sup>6</sup> *Cockburn v. Alexander*, 6 C. B. 791.

<sup>7</sup> *Paine v. Smith*, 33 Minn. 495.

<sup>8</sup> *Pohalski v. Mutual Life Ins. Co.*, 36 N. Y. Super. 234; 56 N. Y. 640.

counsel for the company, nor was it used in a sense peculiar to the business of life insurance. On the contrary, it is plainly to be seen that it was used and understood in its plain, ordinary and popular sense as a familiar word in our language. No evidence of any kind from any other source was therefore admissible to charge that meaning. \* \* \* The company evidently did not intend to stipulate solely against diseases which usually assume an epidemic character. It meant to stipulate, and did stipulate, for exemption from liability in case of death from *any* disease, however simple and harmless, under ordinary circumstances, at home, that might by any possibility prevail in Cuba to an extent that might be called epidemic." This decision was affirmed by the Court of Appeals upon this opinion, in 56 N. Y. 640.

8. In *Hill v. Hibernia Ins. Co.*, 10 Hun, 26, the question was of the meaning, in a fire insurance policy, of the words "standing detached." Evidence was offered to show that in the insurance business this phrase meant standing at least twenty-five feet from any other building. The evidence was rejected on the grounds, first, that the phrase was not ambiguous, and second, that "there was no offer to prove that the particular meaning claimed for the words was known to the assured." No consideration was expressed in the opinion on either ground. The decision was clearly right on the second ground, but the first ground was as clearly untenable.

9. In *O'Donohue v. Leggett*, — N. Y. —; 31 N. E. Rep. 269, it was held that evidence of a trade custom making it the buyer's duty to accept or reject coffee immediately after the receipt and examination of samples is inadmissible where a contract for a sale of coffee, which was in writing, contained no mention of samples, and according to its terms the buyer could await its arrival, and inspection in bulk.

10. In *Sweeney v. Thomason*, 9 Lea, 359; S. C. 42 Am. Rep. 676, an action upon a contract "to pay eight dollars per thousand for brick in the wall," evidence of custom, short of a general custom, to ascertain the number by measurement rather than by count, was held inadmissible. The court observed: "The words and terms used in the contract *prima facie*, at least, are not terms of art having any special signification or meaning, different from their ordinary or popular meaning. The words 'per thousand brick in the wall' will be readily understood to mean literally what the words imply. There is no ambiguity or uncertainty in



the meaning, nor is there any word used not readily understood without interpretation by experts. It would hardly be admissible to prove that by custom or usage of brick masons '1,000' bricks means '500,' or any number less than '1,000.' Where it is not practicable to ascertain the number by actual count, there can be no objection to adopting as the best means of approximating the number, estimates based upon measurement. But such estimates ought ordinarily to be based upon some rule calculated to ascertain the actual number. That is to say, if by actual count a lineal foot of a wall be found to contain a given number of bricks, this rule may be adopted as to the remainder of the wall. But why arbitrarily assume that a lineal foot of the wall contains a number of bricks that it is conceded it does not contain? Clearly this cannot be done unless as contended in behalf of the complainants, the words 'per thousand brick in the wall,' mean not actually 'per thousand,' but 'per thousand' as ascertained by the rule of brick-masons above referred to."

11. In *Barlow v. Lambert*, 28 Ala. (N. S.) 704, it was held that where a contract for the hire of a slave provided that the hirer was "to lose the negro's lost time," evidence of custom was not admissible to show that this phrase related to time lost by sickness or running away, and not by death. The words "are plain and unambiguous. They have but one legitimate meaning, and it was not permissible to give them a different meaning." The court admitted that this holding was in conflict with some decisions and dicta of elementary writers. In *Scott v. Hartley*, 126 Ind. 239, proof of usage was refused to vary the meaning of the word "net" in respect to price, and in *Smith v. Clayton*, 29 N. J. L. 357, to show the meaning of "grain." On a written sale of coffee, making no mention of samples, proof is inadmissible of a custom to accept or reject immediately after the receipt of samples.<sup>1</sup> In *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65, Hand, J., doubted the admissibility of evidence to show that by custom "earth," in a contract for excavation, did not include "hard pan." So where there was an express written warranty on a sale of butter, evidence was held inadmissible to show a local custom that the seller should not take back the butter or make any allowance, unless the purchaser examined it as soon as practicable, and in case of defect in quality returned it or notified the seller.<sup>2</sup> Parol evidence was refused in *Davis v. Ball*, 6 Cush. 505;

<sup>1</sup> *O'Donohue v. Leggett*, 45 N. Y. St. Rep. 308.    <sup>2</sup> *Marshall v. Perry*, 67 Me. 78.

S. C. 53 Am. Dec. 53, to show the meaning of "made useful," in a contract of warranty of a set of teeth, which were returnable if not made useful on trial. The court said there was no ambiguity and excluded evidence to show that the phrase referred to a subsequent adjustment of the teeth. Defendant, president of a bank, addressed to W. a letter, stating that she was authorized to draw on N. for \$300, placed with N. by R. for her account, and that any amount she might wish to draw on N., "we will pay you the money for it here, with usual exchange;" and signed it "Thos. E. Helm, Prest." Plaintiff advanced to W. \$150 on her draft on N., on the faith of that letter. *Held*, that parol evidence was inadmissible to show that the letter was written as an accommodation to W. in response to an inquiry by the bank at her request, and not intended as a letter of credit, or authority to draw; and that the bank could not show, by N.'s letter, written subsequently to the letter of credit, that W. did not have \$300 in N.'s hands.<sup>1</sup>

12. In *Greenstine v. Borchard*, 50 Mich. 434; S. C. 45 Am. Rep. 51, it was held that evidence was incompetent to show a usage to employ whitewood for certain counters, contracted to be of walnut. In *Fuller v. Robinson*, 86 N. Y. 306; S. C. 40 Am. Rep. 540, an action of damages for fraudulent representations by a broker employed to sell cigars, as to responsibility of a proposed buyer from the principal, evidence was admitted on behalf of the defendant, in order to show that the principal did not rely on the representations, that by custom and usage manufacturers and dealers in cigars do not rely on representations by brokers as to the responsibility of purchasers. *Held*, error. In *Corn Ex. Bank v. Nassau Bank*, 91 N. Y. 74; S. C. 43 Am. Rep. 655, it was held that where a bank pays a check drawn upon it to a bank in the same city, which has received it from a depositor, with a forged indorsement, evidence that by usage among banks in that city it was the duty of the former bank to examine and satisfy itself of the genuineness of the indorsement, and to return the check immediately to the latter bank if not good, is incompetent. So in *Woodruff v. Merch. Bank*, 25 Wend. 673, of a custom not to allow days of grace on a bill of exchange. So in *Oelricks v. Ford*, 23 How. 49, where there was an unambiguous contract for the delivery of flour at a certain price, within a specified time at seller's option, evidence of a usage to put up a margin was excluded. Nelson, J., said: "It is not admissible to add to

<sup>1</sup> *Pollock v. Helm*, 54 Miss. 1; S. C. 28 Am. Rep. 342.

or engraft upon the contract new stipulations, nor to contradict those which are plain." This however was *obiter*, because the court held the evidence of usage insufficient.

13. On a contract to pay for plastering by the square yard, evidence was held incompetent to show a custom to include in the measurement one-half the space occupied by the windows, on the ground that it was unreasonable.<sup>1</sup> On a sale of an interest in a steamboat and an indemnity against any and all claims and demands that might arise or be brought against the steamboat, with some specified exceptions, evidence was held improper to show that the words of the contract were by custom used only to designate such debts as might be enforced against the vessel itself.<sup>2</sup> Evidence is incompetent to show the usage of owners of vessels at a particular port to pay bills drawn by the master for supplies at foreign ports.<sup>3</sup> So of usage of a particular port to pay seamen's advance wages to the shipping agent, to be paid to the boarding-house keeper bringing in the seamen. "It is a custom for one of the contracting parties to put himself under the tutelage or guardianship of a particular class of men, and interfere with his right to the direct control and enjoyment of the fruits of his own labor."<sup>4</sup> On a contract to sell "stock on hand" at a certain place, parol evidence was held inadmissible to show that only part of the stock was intended, part not being owned by the seller.<sup>5</sup> On a contract for sale of railroad ties it was held incompetent to show a custom to accept inferior grades at half price.<sup>6</sup> A custom to set off against the insured a general balance due from an insurance broker to the underwriter on settlement of the particular loss is invalid.<sup>7</sup> Under a charter-party to deliver "at H. or as near thereto as the ship can safely come," the custom of H. not to accept delivery elsewhere is bad.<sup>8</sup> It is inadmissible to show a custom of stock brokers to regard certificates of deposit as negotiable.<sup>9</sup>

<sup>1</sup> Jordan v. Meredith, 3 Yeates, 318.

<sup>2</sup> Moran v. Prather, 23 Wall. 492.

<sup>3</sup> Bowen v. Stoddard, 10 Metc. 375.

<sup>4</sup> Metcalf v. Weld, 14 Gray, 210.

<sup>5</sup> Brady v. Cassidy, 104 N. Y. 147.

<sup>6</sup> Larowe v. Lewis, 44 Hun, 226; S. C. on appeal, 128 N. Y. 593.

<sup>7</sup> Todd v. Reid, 4 B. & Ald. 210.

<sup>8</sup> Hayton v. Irwin, 5 C. P. Div. 130.

<sup>9</sup> East Birmingham Land Co. v. Dennis, 85 Ala. 565.

## CHAPTER XV.

### NEGOTIABLE INSTRUMENTS.

- SEC. 60. Date and issue.
- 61. Incapacity.
  - 62. Parties.
  - 63. Agency.
  - 64. Amount.
  - 65. Time of payment.
  - 66. Medium and mode of payment.
  - 67. Conditions of payment.
  - 68. Delivery on condition.
  - 69. Discharge.
  - 70. Consideration.
  - 71. Memoranda.
  - 72. Obscurities.
  - 73. Guaranty.
  - 74. Renewal.
  - 75. Acceptance.
  - 76. Waiver.
  - 77. Alteration.
  - 78. Forgery—ratification.
  - 79. Fraud.
  - 80. Mistake.
  - 81. *Bona fide* holding.
  - 82. Indorsers estopped.
  - 83. Relations of parties.
  - 84. Showing relations as to third parties.
  - 85. Irregular indorsement before payee.
  - 86. Orders.
  - 87. Custom.
  - 88. Collateral mortgage in hands of *bona fide* purchaser.

#### Sec. 60. Date and issue.

Parol evidence is competent to show that a note was not issued until after its date.<sup>1</sup>

Or to show the true date.<sup>2</sup> But not to contradict the date as against an indorsee who relied on it.<sup>3</sup>

<sup>1</sup> Bayley v. Taber, 5 Mass. 286; S. C.

<sup>4</sup> Am. Dec. 57.

Towne v. Rice, 122 Mass. 71.

<sup>2</sup> Biggs v. Piper, 86 Tenn. 589.

<sup>3</sup> Huston v. Young, 33 Me. 85.

## Sec. 61. Incapacity.

Parol evidence is competent to show the total incapacity of the signer, as between the parties, or his personal privilege to avoid it, as between any parties.<sup>1</sup>

As in the case of a wife executing a note as surety for her husband against the prohibition of the statute. *Voreis v. Nussbaum*, — Ind. — ; 16 L. R. Ann. 45.

But not of mere drunkenness, as against an innocent holder for value.<sup>2</sup>

"The merriment of a cheerful cup, which rather revives the spirits than stupefies the reason, is no hindrance to the contracting of just obligations." *Puffendorf*, Bk. 3, ch. 6, sec. 4.

And the maker is estopped from denying the capacity of the payee.<sup>3</sup>

Some cases distinguish between paper made before and paper made after inquisition and finding of incapacity. 1 Dan. Neg. Inst. sec. 213. But in either case proof of ratification is competent. *Ibid*.

## Sec. 62. Parties.

Parol evidence is competent to identify the parties in case of ambiguity or uncertainty.

As where a note was payable to "order of myself," and signed by two, evidence was approved to show that one was payee and the other surety.<sup>4</sup> Or to identify the drawee.<sup>5</sup> But not to show

<sup>1</sup> *Holland v. Barnes*, 53 Ala. 83; S. C. 25 Am. Rep. 595.

*Lancaster Co. Bank v. Moore*, 78 Pa. St. 407; S. C. 21 Am. Rep. 24.

*Gore v. Gibson*, 13 M. W. 623.

<sup>2</sup> *State Bank v. McCoy*, 69 Pa. St. 204; S. C. 8 Am. Rep. 246.

<sup>3</sup> *Taylor v. Croker*, 4 Esp. 187.

*Smith v. Marsack*, 6 C. B. 486.

*Drayton v. Dale*, 2 B. & C. 293.

*Lane v. Krekle*, 22 Iowa, 404.

*Massey v. Bldg. Ass'n*, 22 Kans. 634.

*Stoutimore v. Clark*, 70 Mo. 477.

*Vater v. Lewis*, 36 Ind. 291; S. C. 10 Am. Rep. 29.

*Griener v. Ulerey*, 20 Iowa, 266.

*Johnson v. Conklin*, 119 Ind. 109.

*Contra: Peaslee v. Robbins*, 3 Metc. 164.

<sup>4</sup> *Adams v. King*, 16 Ill. 169.

*Jenkins v. Bass*, 88 Ky. 397; S. C. 21 Am. St. Rep. 344.

*Megginson v. Harper*, 2 Cromp. & M. 322.

*Bacon v. Fitch*, 1 Root, 181.

*Knight v. Jones*, 21 Mich. 161.

*Jacobs v. Benson*, 39 Me. 132; S. C. 63 Am. Dec. 609.

*U. S. v. White*, 2 Hill, 59.

*Cox v. Beltzhoover*, 11 Mo. 142; S. C. 47 Am. Dec. 145.

*Newport M. M. Co. v. Starbird*, 10 N. H. 123; S. C. 34 Am. Dec. 145.

*McKinney v. Harter*, 7 Blackf. 385; S. C. 43 Am. Dec. 96.

<sup>5</sup> *Cork v. Bacon*, 45 Wis. 192.

*McCullough v. Wainright*, 14 Pa. St. 171.

*Jackson v. Sill*, 11 Johns. 211.

that payment was to be made to any other person than the payee.<sup>1</sup> And not to supply an omitted payee, where no blank is left for his name.<sup>2</sup> Nor to supply an entire omission to name a payee.<sup>3</sup> But "you" may be identified.<sup>4</sup> And a subsequent agreement that payment may be made to another is provable.<sup>5</sup>

### Sec. 63. Agency.

One authorized, and signing a note or bill apparently as agent, but not showing in the body of the paper an intent to bind a principal, otherwise than by the use of mere words of description, may not evade his personal liability by parol.<sup>6</sup>

But one who accepts as "agent" may show by parol that it was the intention and agreement of the parties that he was to respond only from the principal's funds, although the bill is addressed to him as an individual.<sup>7</sup> An agent indorsing as principal may not deny his liability.<sup>8</sup> But one unauthorized, and signing apparently as agent, is himself not liable.<sup>9</sup> So of one who signs a fictitious name, or the name of a real person without authority.<sup>10</sup>

But parol evidence is competent to charge an undisclosed principal.<sup>11</sup>

<sup>1</sup> Draper v. Rice, 56 Iowa, 114.

<sup>2</sup> McIntosh v. Lytle, 23 Minn. 336; S. C. 37 Am. Rep. 410.

<sup>3</sup> Gibson v. Minet, 1 H. Bl. 569.  
Brown v. Gilman, 13 Mass. 158.  
Douglass v. Wilkeson, 6 Wend. 637.

<sup>4</sup> Kinney v. Flynn, 2 R. I. 319.  
<sup>5</sup> Shackelford v. Hooker, 54 Miss. 716.

<sup>6</sup> Low v. Treadwell, 12 Me. 441.

<sup>7</sup> Tannatt v. Rocky Mountain Bank, 1 Colo. 278; S. C. 9 Am. Rep. 156.

Sturdivant v. Hull, 59 Me. 172; S. C. 8 Am. Rep. 409.

Hypes v. Griffin, 89 Ill. 134; S. C. 31 Am. Rep. 71.

Burlingame v. Brewster, 79 Ill. 515; S. C. 22 Am. Rep. 177.

Liebscher v. Kraus, 74 Wis. 387.

Tarver v. Garlington, 27 S. C. 107  
S. C. 13 Am. St. Rep. 628.

*Contra*: Means v. Swormstedt, 32 Ind. 87; S. C. 2 Am. Rep. 330; the case of a promise by "we," and a signing by "W. B. S., secretary," with a corporate seal.

<sup>8</sup> Hardy v. Pilcher, 57 Miss. 18; S. C. 34 Am. Rep. 432.

Laffin, etc., Co. v. Sinsheimer, 48 Md. 411; S. C. 30 Am. Rep. 472.

*Contra*: Robinson v. Kanawha Valley Bank, 44 Ohio St. 441; S. C. 58 Am. Rep. 829.

Nat. City Bank v. Westcott, 118 N. Y. 468; S. C. 16 Am. St. Rep. 771.

<sup>9</sup> Sheffield v. Ladue, 16 Minn. 388; S. C. 10 Am. Rep. 145.

<sup>10</sup> Bartlett v. Tucker, 104 Mass. 336; S. C. 6 Am. Rep. 240.

<sup>11</sup> Bank v. Bank, 5 Wheat. 326.

Hager v. Rice, 4 Colo. 90; S. C. 34 Am. Rep. 68.

1. In *Pierson v. Atlantic National Bank*, 77 N. Y. 304, there was a loan upon the individual notes of defendant's cashier; the checks for the loan were made payable to his order, and the entries in the lender's book were of a loan to him. It was held that this was not conclusive, but that parol evidence was competent to show that the loan was to the defendant. Citing *Coleman v. Bank of Elmira*, 53 N. Y. 388; *Van Leuven v. Bank of Kingston*, 54 N. Y. 671.

2. *Stackpole v. Arnold*, 11 Mass. 27; S. C. 6 Am. Dec. 150, to the contrary *obiter* on this point, is overruled and generally disapproved, and the *obiter* expressions in regard to negotiable paper, in *Webster v. Wray*, 19 Neb. 558; S. C. 56 Am. Rep. 754, must be regarded as opposed to the weight of authority, founded as they are mainly on the Massachusetts cases.

And when the character of the signing or of the language in the body is ambiguous, parol evidence is competent to show whether it was as agent or principal.<sup>1</sup>

3. As in *Carpenter v. Farnsworth*, 106 Mass. 561; S. C. 8 Am. Rep. 360, where a check had "Ætna Mills" printed on the margin, was signed "T. D. F., Treasurer," and was given for debt of the mills, it was held not to bind F. personally. The court said, by Gray, J.: "The court has always laid hold of any indication on the face of the paper, however informally expressed, to enable it to carry out the intention of the parties." And so in *Houghton v. First Nat. Bank*, 26 Wis. 663; S. C. 7 Am. Rep. 107, where a cashier of a bank, to enable the payee to raise money to take up paper held by the bank, indorsed his name on a note not belonging to the bank as "G. B., cas.," it was held to bind the bank, and *obiter* the court said that such would be the effect even if the indorsement had been purely for accommodation. So in *Bean v. Pioneer Mining Co.*, 66 Cal. 451; S. C. 56 Am. Rep. 106, a note phrased "we promise," and signed "Pioneer Mining Company, John E. Mason, Superintendent," upon parol proof was

<sup>1</sup> *Haile v. Pierce*, 32 Md. 327; S. C. 3 Am. Rep. 139.

*Lafin, etc., Co. v. Sinsheimer*, 48 Md. 411; S. C. 30 Am. Rep. 472.

*Schmittler v. Simon*, 114 N. Y. 176; S. C. 11 Am. St. Rep. 621 (draft accepted by "S., executor").

*Richmond, etc., R. Co. v. Snead*, 19 Gratt. 354.

*Martin v. Smith*, 65 Miss. 2.

*Hager v. Rice*, 4 Colo. 90; S. C. 34 Am. Rep. 68.

*McClellan v. Reynolds*, 49 Mo. 314.

*Pratt v. Beaupre*, 13 Minn. 190.

*Vater v. Lewis*, 36 Ind. 288; S. C. 10 Am. Rep. 29.

*Bean v. Pioneer Min. Co.*, 66 Cal. 451; S. C. 56 Am. Rep. 106.

held to be the note of the company alone, and to the same effect is *Liebscher v. Kraus*, 74 Wis. 387; S. C. 17 Am. St. Rep. 171.

4. In *Reeve v. First National Bank of Glassboro*, New Jersey Court of Errors and Appeals, the court said: "The cases in which the liability of parties to paper similar to this is determined are not uniform in their results. Indeed, great contrariety of views can be found in the decisions upon this question. A detailed examination of those cases would not result in much profit. The result of the best-considered decisions is this: Where nothing appears in the body of a note to indicate the maker, and the note is signed by a corporate name, under which name appears the name of an officer of the company, with his corporate official title affixed thereto, in such case the note is taken conclusively to be that of the corporation. Where however a note drawn in a similar form, except as to the signatures, is subscribed by the name of an officer of the corporation, to which name is affixed his title as an officer of a particular corporation, the result is not the same. In respect to notes drawn in the last-mentioned form, the courts in most of the states hold that there is an ambiguity arising out of this manner of coupling the names of the natural person and of the corporation. It is therefore open to the parties to introduce extrinsic testimony to disclose facts from which it can be concluded which of the parties should be regarded as the maker. In this state the rule is that a note drawn in this form is *prima facie* the note of the person signing and not the note of the corporation; but this is only a disputable presumption, and upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended to be the note of the corporation, which evidence can of course be met with counter-evidence of the same character. This rule was definitely settled in the case of *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182. In this case a note was signed, 'John Kean, Prest. F. & S. S. R. R. Co.' It was held to be *prima facie* the note of Kean, but it was held that parol evidence might be introduced to show whether it really was the personal note of the officer or was the note of the railroad company. If therefore the present notes had been signed, 'J. Price Warrick, President of the Warrick Glass Works,' it, in the absence of parol testimony to show a contrary intention, would be regarded as the note of Warrick. As the notes are signed with the name of the corporation, followed by the words, 'J. Price Warrick, Pres.,' they are



taken to be corporation paper. This conclusion seems to rest upon rational ground. The name of the corporation signed first stands as a principal and that of the officer as agent. The name of a corporation so placed, raises the implication of a corporate liability. To so place it requires the hand of an agent. The name of an officer of such corporation, to which name the official title is appended, put beneath the corporate name, implies the relation of principal and agent. It means that inasmuch as every corporate act must be done by a natural person, this person is the agent by whose hand the corporation did the particular act. This form of signature is just as significant in respect to the notes in question as if the name the 'Warrick Glass Works' had been written 'Per Warrick, Agent.' The following are cases in which notes in similar form to those now in suit have been held to be solely the notes of the corporation whose name first appeared, followed by the name of an officer. *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 66 Am. Rep. 106; *Atkins v. Brown*, 59 Me. 90; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Miller v. Roach*, 150 Mass. 140, 6 L. R. A. 71; *Draper v. Massachusetts Steam-Heat Co.*, 5 Allen, 388; *Liebscher v. Kraus*, 74 Wis. 387, 5 L. R. A. 496.<sup>1</sup>

5. In *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326, such evidence was admitted in respect to a check which was apparently unambiguous, being signed "W. P., Jr." and drawn to the order of "P. H. M." without words of description in either case. Johnson, J., said: "It is by no means true, as was contended in argument that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent the liability of the principal depends upon the facts: (1) that the act was done in the exercise and (2) within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act, with or without writing, within the scope of the power or confidence reposed in the agent; as for instance, in the case of money credited in the books of a teller, or proved to have been deposited

<sup>1</sup> See *Liebschaur v. Kraus*, 74 Wis. 587.

*Miller v. Roach*, 150 Mass. 340.

with him, though he omits to credit it." Proof was allowed that the check was signed by W. P., Jr., as cashier, and that it was the check of the bank. This case goes to the greatest extreme of any.<sup>1</sup>

Authority to an agent to make or indorse a note may be given by parol.<sup>2</sup>

## Sec. 64. Amount.

Parol evidence is not competent to supply an entire omission of the amount in the body.<sup>3</sup>

Nor to show that marginal figures and not the words indicated the true amount.<sup>4</sup> Evidence is not admissible to change the specified rate of interest.<sup>5</sup> But evidence is competent to show the intent as to interest where it is ambiguous.<sup>6</sup> Evidence is inadmissible to contradict the amount.<sup>7</sup>

## Sec. 65. Time of payment.

Parol evidence is competent to show an agreement to extend the time of payment as between the parties.<sup>8</sup>

In *Bradshaw v. Combs*, 102 Ill. 428, an indorsement was made on a note, "it is agreed by the parties to this note that the interest shall be at the rate of ten per cent. until paid." Parol evidence was allowed to show that at the same time it was orally agreed that the time of payment should be extended one year, and that the promise to pay ten per cent. interest instead of eight formed the consideration.

<sup>1</sup> See also *Hood v. Hallenbeck*, 7 Hun, 367.

See 15 Alb. Law Journ. 409; 16 id. 117, 345.

*Wharton Agency*, 290.

*Story Agency*, secs 155, 275.

*Pars. Notes*, 90.

*Story Notes* sec. 68.

*Edw. Notes*, 83.

*Dan. Neg. Inst.* sec. 418.

<sup>2</sup> *Dan. Neg. Inst.* sec. 209.

*Brown v. Bookstaver*, — Ill. —; 31 N. E. Rep. 17.

<sup>3</sup> *Brown v. Beebe*, 1 D. Chip. 227; S. C. 6 Am. Dec. 728.

*Hollen v. Davis*, 59 Iowa, 444; S. C. 44 Am. Rep. 688.

<sup>4</sup> *Smith v. Smith*, 1 R. I. 398; S. C. 53 Am. Dec. 652.

*Williamson v. Smith*, 1 Cold. 1; S. C. 78 Am. Dec. 478.

<sup>5</sup> *Davis v. Stout*, 126 Ind. 12; 25 N. E. Rep. 862.

<sup>6</sup> *Payson v. Lamson*, 134 Mass. 593; S. C. 45 Am. Rep. 348.

<sup>7</sup> *Beard v. White*, 1 Ala. (N. S.) 436.

*Carter v. Hamilton*, 11 Barb. 147.

*Downs v. Webster*, Brayt. 79.

*Gazoway v. Moore*, Harper, 401.

*Eaves v. Henderson*, 17 Wend. 190.

<sup>8</sup> *Ferguson v. Hill*, 3 Stew. 485; S. C. 21 Am. Dec. 641.

*Blake v. Coleman*, 22 Wis. 415; S. C. 99 Am. Dec. 53.

*Solomons v. Jones*, 3 Brev. 54.

But evidence is not admissible to show an originally-intended different time of payment.<sup>1</sup>

Where the note does not clearly specify a time of payment it may be supplied by parol. As where the time of payment was specified in a memorandum at the bottom of the note, evidence was admitted to show the circumstances in which it was made.<sup>2</sup> So where the time was "— months."<sup>3</sup> Or "seventy-five after date."<sup>4</sup> But an entire omission to state a time of payment renders it payable on demand and may not be supplied by parol.<sup>5</sup>

Parol evidence is inadmissible to show that a note absolute on its face and delivered absolutely was not to be paid until the happening of a certain contingency.<sup>6</sup>

## Sec. 66. Medium and mode of payment.

Parol evidence is competent to explain an ambiguity in the character of the funds in which the paper is payable.

As to show the meaning of "Canada money."<sup>7</sup> But not to show that "interest from date at the rate of eight per cent. per annum" was to be paid annually.<sup>8</sup> Nor to show that a note payable in lawful money was to be paid in silver.<sup>9</sup> Nor that "dollars" permitted paper currency, notes or goods, or anything but lawful coin of the United States.<sup>10</sup> Nor that "currency of the State" warranted anything but gold, silver, or notes of the State bank.<sup>11</sup> Nor that it was to be paid out of a particular fund or estate.<sup>12</sup> But in respect to a note made in Alabama, during the civil war,

<sup>1</sup> Thompson v. Ketcham, 8 Johns. 190 ; S. C. 5 Am. Dec. 332.

Campbell v. Upshaw, 7 Humph. 185 ; S. C. 46 Am. Dec. 75.

Stucksleger v. Smith, 27 Iowa, 286.

Dan. Neg. Inst. sec. 80.

Doss v. Peterson, 82 Ala. 253.

<sup>2</sup> Heywood v. Perrin, 10 Pick. 228.

Stowe v. Merrill 77 Me. 550.

<sup>3</sup> Union Bank v. Meeker, 4 La. Ann. 189 ; S. C. 50 Am. Dec. 559.

<sup>4</sup> Boykin v. Bank of Mobile, 72 Ala. 262 ; S. C. 47 Am. Rep. 408.

<sup>5</sup> Thompson v. Ketcham, 8 Johns. 190 ; S. C. 5 Am. Dec. 332.

<sup>6</sup> Foy v. Blackstone, 31 Ill. 538 ; S. C. 83 Am. Dec. 246.

<sup>7</sup> Thompson v. Sloan, 23 Wend. 71 ; S. C. 35 Am. Dec. 546.

<sup>8</sup> Koehring v. Muemminghoff, 61 Mo. 403 ; S. C. 21 Am. Rep. 402.

<sup>9</sup> Alsop v. Goodwin, 1 Root, 196.

<sup>10</sup> Thorington v. Smith, 8 Wall 12.

Noe v. Hodges, 3 Humph. 162.

Stewart v. Salamon, 94 U. S. 434.

Hair v. LaBrouse, 10 Ala. (N. S.) 548.

Lohman v. Crouch, 19 Gratt. 331.

Langenberger v. Kroege, 48 Cal. 147.

Com. v. Beaumarchais, 3 Call, 122.

Bradley v. Anderson, 5 Vt. 152.

<sup>11</sup> Cockrill v. Kirkpatrick, 9 Mo. 697.

<sup>12</sup> Adams v. Wilson, 12 Metc. 138.

Brown v. Spofford, 95 U. S. 482.

Conner v. Clark, 12 Cal. 168 ; S. C. 73 Am. Dec. 529.

Jones v. Pac. etc. Co. 13 Nev. 359 ; S. C. 29 Am. Rep. 308

Ockington v. Law, 66 Me. 551.

parol evidence was held admissible to show that Confederate money was intended. "It simply explains an ambiguity," said Chief Justice Chase.<sup>1</sup> But such a note payable in "specie" may be paid only in United States currency.<sup>2</sup>

A subsequent agreement that payment may be made to another than the payee is provable.<sup>3</sup>

In *Rugland v. Thompson*, — Minn. — ; 51 N. W. Rep. 604, the payee and holder of a promissory note having accepted from the maker certain personal property and services, it was held that proof is admissible that it was orally agreed, when the note was made, that whatever should be thus supplied to the payee should be applied in payment on the note; such evidence being admissible, not to vary the agreement expressed in the note, but only as bearing upon and characterizing the subsequent delivery and acceptance of the property and services.

## Sec. 67. Conditions of payment.

Parol evidence is incompetent to show that a note was payable only upon a condition, as against innocent third parties.<sup>4</sup>

1. Even as between immediate parties parol evidence is inadmissible to show that payment of a note was conditional.<sup>5</sup> In *Ellis v. Hamilton*, 4 Sneed, 512, it was said: "The doctrine is well established that in an action on a promissory note or bill of exchange, the defendant will not be allowed to give evidence of a parol agreement between him and the plaintiff, at the time of

<sup>1</sup> *Thorington v. Smith*, 8 Wall. 12.

<sup>2</sup> *Glover v. Robbins*, 49 Ala. 219; S. C.

<sup>3</sup> *Low v. Treadwell*, 12 Me. 441.  
20 Am. Rep. 272.

<sup>4</sup> *Foster v. Clifford*, 44 Wis. 569; S. C.  
28 Am. Rep. 603.

*Martin's Exrs. v. Lewis' Exrs.* 30  
Gratt. 672; S. C. 32 Am. Rep. 682.

*Erwin v. Saunders*, 1 Cow. 249; S. C.  
13 Am. Dec. 520.

*Hatch v. Hyde*, 14 Vt. 25; S. C. 39  
Am. Dec. 203.

*Adams v. Wilson*, 12 Met. 138; S. C.  
45 Am. Dec. 240.

*Allen v. Furbish*, 4 Gray, 504; S. C. 64  
Am. Dec. 87.

*Ely v. Kilborn*, 5 Denio, 514

*West v. Kelly*, 19 Ala. 353; S. C. 54  
Am. Dec. 192.

*Walker v. Crawford*, 56 Ill. 444; S. C.  
8 Am. Rep. 701.

*Penny v. Graves*, 12 Ill. 287.

*Dale v. Pope*, 4 Litt. 166.

*Brown v. Hull*, 1 Denio, 400.

*Holt v. Moore*, 5 Ala. (N. S.) 521.

*Sears v. Wright*, 24 Me. 278.

*Jones v. Shaw* 67 Mo. 667.

*Wayland Univ. v. Boorman*, 56 Wis.  
660.

<sup>5</sup> *Walker v. Crawford*, 56 Ill. 444; S. C.  
8 Am. Rep. 701.

*Foy v. Blackstone*, 31 Ill. 538; S. C. 83  
Am. Dec. 246.

*Osborne v. Taylor*, 58 Conn. 439.

making the note, that it should be renewed, and that payment should not be demanded on its becoming due; or that a note payable on demand was intended by the parties to be payable on a contingency; or that a note payable on a certain day was intended to be payable on some other day; or that it was to be paid out of a particular fund; or that it should be paid in any other mode than is imported on its face." In an action on a note of \$400, parol evidence was held inadmissible to show that the plaintiff orally agreed to sell defendant land in consideration of an annuity of \$40 for life, that she deeded the land, and he gave the note in payment.<sup>1</sup> Parol evidence of an agreement between payee and drawer of a bill that the drawer was not to be liable is inadmissible.<sup>2</sup> And so as to the liability of the maker or any other party.<sup>3</sup> In *Thompson v. Hall*, 45 Barb. 214, defendant Hall had signed a note as surety for defendant Thompson, at the request of plaintiff, the mother of the principal debtor. Evidence was held inadmissible to show that he signed only on the condition, assented to by the plaintiff, that on maturity the plaintiff would collect it promptly.

2. The Supreme Court of Arizona very recently held<sup>4</sup> that in an action on a promissory note, parol evidence is inadmissible to show an oral agreement that the payee would save the sureties harmless, and satisfy the note out of collateral securities deposited by the principals. The court said: "The written contract (the note) was that the makers would pay the note at the time expressed therein, without qualification or condition. When suit is brought, answer is filed, in substance, that the payee has no right to take judgment against the sureties at least, if we concede they were sureties, because plaintiff below agreed by parol, at the time these defendants signed the note, to use collateral security, which it held, or claimed to have, at the time defendants signed the notes as sureties. In other words, part of the contract was in writing, and part was by parol, or there was a contemporaneous

<sup>1</sup> *Coapstick v. Bosworth*, 121 Ind. 6.

<sup>2</sup> *Cummings v. Kent*, 44 Ohio St. 92; S. C. 58 Am. Rep. 796; distinguishing *Morris v. Faurot*, 21 Ohio St. 155; S. C. 8 Am. Rep. 45, and *Dye v. Scott*, 35 Ohio St. 194; S. C. 35 Am. Rep. 604, cases of agreements between indorser and indorsee, and citing *Martin v. Cole*, 104 U. S. 30; *Davis v. Randall*, 115 Mass. 547; S. C. 15 Am. Rep. 146, etc.

<sup>3</sup> *Wright v. Remington*, 41 N. J. L. 48; S. C. 32 Am. Rep. 180.

*Dolson v. DeGanahl*, 70 Tex. 621.

*Davy v. Kelley*, 66 Wis. 455.

*Mason v. Mason*, 72 Iowa, 457.

*Bishop v. Dillard*, 49 Ark. 285.

*Rendell v. Harriman*, 75 Me. 497.

*Davis v. England*, 141 Mass. 587.

<sup>4</sup> *Stewart v. Alberquerque Nat. Bank*, — Ariz. —; 30 Pac. Rep. 303.

collateral parol agreement. The parol agreement varies, if it does not contradict, the written undertaking. On the face of the written undertaking (the note) there must be payment or judgment. 'It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note cannot be permitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written contract.' 2 Pars. Bills & N. 501; *Specht v. Howard*, 16 Wall. 564; *Forsythe v. Kimball*, 91 U. S. 294. The rule, in the language of *Greenleaf*, is: 'The rule, briefly expressed, is, parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.' 1 *Greenl. Ev.* 351. The rule is elementary," etc.

Evidence has been held inadmissible to show that the payee promised to procure another signer, and to collect and apply certain subscriptions.<sup>1</sup>

Daniel says (*Neg. Inst.* § 80): "Thus where a note is payable on demand, it cannot be shown by verbal testimony that it was agreed that it should not be paid till after the decease of the testator; nor until after sale of the maker's estates; nor until a certain account should be adjusted and credited on its face; nor until certain premises were delivered up; nor until a dividend of a bankrupt's assets should have been made; nor until the amount was collected from certain sources; nor until a certain draft was received. Nor can it be shown verbally that demand of a post-dated check was not to be made at maturity; nor \* \* \* that there was any agreement to prolong or vary the time of payment, specified in the instrument, by taking part payment and waiting for the residue, by receiving payment in installments or otherwise than as the instrument itself declares. \* \* \* Nor that it was not to be paid in case a certain verdict was obtained, or in any other event." But it has been held that a surety may show the agreement of the holder not to look to him, and this is put on the ground of failure of consideration.<sup>2</sup>

## Sec. 68. Delivery on condition.

But the delivery of a note may be conditional; as to be operative only upon the occurrence of a certain event.<sup>3</sup>

<sup>1</sup> *Clanin v. Esterly H. Co.* — Mich. —.      <sup>3</sup> *Sweet v. Stevens*, 7 R. I. 375.

<sup>2</sup> *Kulenkamp v. Groff*, 71 Mich. 675; S.      *Bernhardt v. Brunner*, 4 Bosw. 528.  
C. 15 Am. St. Rep. 283.

Thus it may be given in escrow to a third person, as between the original parties.<sup>1</sup> Or even to the payee himself.<sup>2</sup> In *Benton v. Martin*, 52 N. Y. 574, a duplicate draft was issued for the lost original, the drawer imposing the condition that he would be responsible for any past laches. Folger, J., said: "Instruments not under seal may be delivered to the one to whom on their face they are made payable, or who by their tenor is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties and others having notice, the want of consideration may be shown." Mr. Daniel says of this doctrine, "unless the non-fulfillment of the condition goes to the failure of consideration this would seem to trench upon fixed principles of law. \* \* \* Evidence is admissible to deny the receipt of value, but not to vary the engagement." (Neg. Inst. § 81*a*.) And he makes the same criticism on *Bissinger v. Guiteman*, 6 Heisk. 277, where it was held that parol evidence was admissible, that where a note was executed it was agreed that it should be held for nothing on the happening of a certain event. So in *McFarland v. Sikes*, 54 Conn. 250; S. C. 1 Am. St. Rep. 111, parol evidence was admitted to show that the note was delivered by the defendant to the plaintiff on condition that it should be returned to the defendant on a certain day, if demanded, and that it was so demanded, and delivery was refused. The court approved *Benton v. Martin*, *supra*, observing: "Such evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery." And where one signs as surety he may deliver on condition that an additional surety is obtained.<sup>3</sup> In *Miller v. Gambie*, 4 Barb. 146, parol evidence was allowed to show that the defendant signed on condition that another should sign above his signature.<sup>4</sup>

<sup>1</sup> *Couch v. Meeker*, 2 Conn. 302.

*Taylor v. Thomas*, 13 Kans. 217.

*Alexander v. Wilkes*, 11 Lea, 221.

<sup>2</sup> *Benton v. Martin*, 52 N. Y. 574.

<sup>3</sup> *Westman v. Krumweide*, 30 Minn. 313.

*Goff v. Bankston*, 35 Miss. 518, the case of a sealed note.

<sup>4</sup> *Contra as to third parties*: *Ward v. Hackett*, 30 Minn. 150.

In *Brown v. Eastern Slate Co.* 134 Mass. 590, a note was given by a corporation in pursuance of a written agreement, upon the oral condition that there was to be no individual liability, under the statutes, on the part of the officers executing it. Judgment was obtained against all the parties to the note, but in equity the officers were relieved upon proof of the condition. Holmes, J., said: "But the rule excluding evidence of oral agreements to vary a writing goes no farther than the writing goes. And at most, the writing only expresses the obligation of the party signing it. \* \* \* And the most obvious and natural view is that the promise is the only thing which the writing has undertaken or purports to express, either in words or by legal implication. Certainly the writing does not extend to the remedies which the law will furnish for the collection of damages, even from the promissor himself," etc.

### **Sec. 69. Discharge.**

As between the original parties a note may be shown to have been discharged by the performance of an oral agreement.

As where it was agreed that a note payable in money might be paid in merchandise, and was so paid.<sup>1</sup> In *People v. Universal Life Ins. Co.* 21 Weekly Dig. 112, B. petitioned the court for an order requiring the receiver of an insolvent insurance company to deliver to him certain paid-up policies of insurance which he claimed to own, and which were in the hands of said receiver. The receiver resisted the application upon the ground that such policies had been held by the company as collateral security for the payment of a note made by B. *Held*, that B. might show, by parol evidence, that the money for which the note was given was not a loan, but an advance for services to be performed, which had been so performed. So where a debtor was garnished and executed a note for the debt, evidence was admitted to show that at the time of the execution, it was orally agreed that if judgment should be recovered against the debtor in the garnishment proceedings, and paid, the amount should be deducted from the note, and that it was so recovered and paid.<sup>2</sup> This was put on the ground of partial failure of consideration. So where one paid

<sup>1</sup> *Buchanon v. Adams*, 49 N. J. L. 636;

S. C. 60 Am. Rep. 666.

*Howard v. Stratton*, 64 Cal. 487.

*Crosman v. Fuller*, 17 Pick. 171.

<sup>2</sup> *Peterson v. Johnson*, 22 Wis. 21; S. C. 94 Am. Dec. 581.



a note which was secured by a mortgage on a farm which he had purchased from the maker and mortgagor, the latter was allowed to prove the grantee's oral assumption of the note and mortgage as part of the purchase price.<sup>1</sup>

## Sec. 70. Consideration.

As between the immediate parties, or as to subsequent parties with previous notice, want of consideration, or failure in whole or in part, or wrongful diversion of the note from its purpose, may be shown by parol.<sup>2</sup>

So where a note was executed for future services, parol evidence was allowed of the contemporaneous condition that the maker would not accept the services unless the payee brought a recommendation from a certain third person, that it was not produced, and that the services were never accepted nor rendered.<sup>3</sup> But not as against an accommodation indorser, who has been compelled to pay the paper.<sup>4</sup> Nor may an accommodation indorser, when sued, set this up as a defense.<sup>5</sup> So as between the parties, a note executed on account of a demand previously voluntarily released under seal, in consideration of part payment, is not enforceable.<sup>6</sup> And one who has given his note to settle a claim for injury to hired property may show, as between himself and the payee, that he was not liable for that injury.<sup>7</sup> Oral evidence is admissible to show that the use of an accommodation note was restricted by the parties thereto.<sup>8</sup>

The foregoing doctrine as to failure of consideration has been extended to subsequent parties who had notice thereof before acquiring their rights. Thus in *Braly v. Henry*, 71 Cal. 481; S. C. 60 Am. Rep. 543, in an action by an indorsee on a promissory note given for goods sold, parol evidence was admitted to show

<sup>1</sup> *Fall v. Glover*, — Neb. —; 52 N. W. Rep. 168.

<sup>2</sup> *Stackpole v. Arnold*, 11 Mass. 27; S. C. 6 Am. Dec. 150.

*Folsom v. Mussey*, 8 Greenl. 400; S. C. 23 Am. Dec. 522.

*West v. Kelly*, 19 Ala. 353; S. C. 54 Am. Dec. 192.

*Scott v. Sweet*, 2 G. Greene, 224.

*Lewis v. Gray*, 1 Mass. 297; S. C. 2 Am. Dec. 21.

*Ramsey v. Young*, 69 Ala. 158.

*First Nat. Bk. v. Nugen*, 99 Ind. 160. *Maltz v. Fletcher*, 52 Mich. 484.

<sup>3</sup> *Corbin v. Sistrunk*, 19 Ala. (N. S.) 203.

<sup>4</sup> *Foster v. Clifford*, 44 Wis. 569; S. C. 28 Am. Rep. 603.

<sup>5</sup> *Gillespie v. Torrance*, 25 N. Y. 306.

<sup>6</sup> *Ingersoll v. Martin*, 58 Md. 67; S. C. 42 Am. Rep. 322.

<sup>7</sup> *Gunning v. Royal*, 59 Miss. 45; S. C. 42 Am. Rep. 350.

<sup>8</sup> *Western Nat. Bank v. Wood* (Sup. Ct.) 19 N. Y. Supp. 81.

that the parties not knowing the exact quantity of the goods, agreed that if they fell short of the estimated quantity a corresponding deduction should be made from the note; that they did fall short; and that the plaintiff had notice of these facts before he acquired the note. The court put this on the theory of a contemporaneous oral agreement, but it seems hardly consistent with that doctrine, for the oral matter was manifestly contradictory of the agreement, and can hardly become admissible except on the theory of failure of consideration.

Parol evidence is competent, between the original parties, to show that the consideration was illegal.<sup>1</sup> And to show the real consideration and purpose.<sup>2</sup> And to show that it was fraudulent.<sup>3</sup> And to show an additional collateral consideration, as that certain lawsuits were to be discontinued.<sup>4</sup> And to show an agreement that the maker was at liberty to return the goods for which it was given.<sup>5</sup> But not to show that it was not to be enforced if the horse for which it was given should die before the end of the season.<sup>6</sup> And to show that it was intended as a mere receipt.<sup>7</sup> In *Brook v. Latimer*, 44 Kans. 431; S. C. 21 Am. St. Rep. 292, it was held that parol evidence is admissible to show that a promissory note for the payment of \$10,000, executed by a daughter to her father, who is living, payable on demand, was executed by the daughter and received by the parent as a mere receipt or memorandum of an advancement made by the parent to the child, with the mutual understanding that payment would never be enforced. The court said: "We do not deem the admission of evidence tending to show that a promissory note, absolute by its

<sup>1</sup> *Buck v. First Nat. Bank*, 27 Mich. 293; S. C. 15 Am. Rep. 189.

*Woods v. Armstrong*, 54 Ala. 150; S. C. 25 Am. Rep. 671.

*Gill v. Morris*, 11 Heisk. 614; S. C. 27 Am. Rep. 744.

*Eldred v. Malloy*, 2 Colo. 320; S. C. 25 Am. Rep. 752.

*Donley v. Tindall*, 32 Tex. 43; S. C. 5 Am. Rep. 234.

*Henderson v. Palmer*, 71 Ill. 579; S. C. 22 Am. Rep. 117.

*Contra (and questionable)*: *Bibb v. Hitchcock*, 49 Ala. 468; S. C. 20 Am. Rep. 288.

<sup>2</sup> *Fort v. Orndoff*, 7 Heisk. 167.

*Miller v. McKenzie*, 95 N. Y. 575.

*Wolford v. Powers*, 85 Ind. 294; S. C. 44 Am. Rep. 16.

*Martin v. Stubbings*, 126 Ill. 387; S. C. 9 Am. St. Rep. 620.

<sup>3</sup> *Harris v. Alcock*, 10 G. & J. 226; S. C. 32 Am. Dec. 158.

*Larrabee v. Fairbanks*, 24 Me. 363; S. C. 41 Am. Dec. 389.

*Bookstaver v. Glenney*, 3 Thomp. & Cook (N. Y. Supr.) 248.

<sup>5</sup> *Barnes v. Shelton, Harper*, 33; S. C. 23 Am. Dec. 642.

<sup>6</sup> *Gatlin v. Kilpatrick*, 1 Car. L. 534; S. C. 6 Am. Dec. 557.

<sup>7</sup> *Smith v. Rowley*, 34 N. Y. 367.

*Contra*: *City Bank v. Adams*, 45 Me. 455.

express terms, is a mere evidence of an advancement by a parent to a child, to be a violation of that rule of evidence that forbids a written instrument to be varied or contradicted by parol. The numerous reported cases, including deeds that recite a moneyed consideration, bonds under seal and promissory notes in absolute terms, justify the admission of such evidence, on the principle that the consideration recited in the instrument is always subject to judicial inquiry. This court is usually liberal in the application of the rule that permits such inquiry. In almost every reported case in which the controlling question was whether or not such parol evidence was admissible to show that some written instrument of indebtedness taken by a parent from a child was in fact a mere receipt or memorandum of an advancement, it is held that such evidence should be received. This case however differs from all the reported cases that have been cited, or that we have examined, in this respect. The parent that made the advancement is still alive, and is now insisting that the memorandum or receipt showing the amount of the advancement at the time it was made is both *prima facie* and conclusive evidence of a debt." But evidence is inadmissible that defendants signed the note not intending it to be an obligation to pay a definite sum of money, but as an undertaking to furnish plaintiff with a horse, and that the note was signed on plaintiff's express representation that it was a mere matter of form and not an obligation.<sup>1</sup> And in like manner it has been held incompetent to show that it was intended as a mere receipt for money to be lent for the payee.<sup>2</sup> A note not valid on its face may not be made valid by the addition of a parol agreement. As a parol charge of a wife's separate estate.<sup>3</sup> Evidence is admissible to show whether a note was originally intended or subsequently transferred as payment of a debt, or only as collateral security.<sup>4</sup> Evidence is admissible to show that a note was given in consideration of the surrender and cancellation of old notes.<sup>5</sup>

The illegality of the consideration may be shown, although the note is secured by a mortgage. Thus in *Moffitt v. Wilson*,

<sup>1</sup> *Ziegler v. McFarland*, — Pa. —; 23 Atl. Rep. 1045.

<sup>2</sup> *Shaw v. Shaw*, 50 Me. 94; S. C. 79 Am. Dec. 605.

*Billings v. Billings*, 10 Cush. 178.

*Dickson v. Harris*, 60 Iowa, 727.

<sup>3</sup> *Kimm v. Weippert*, 46 Mo. 532; S. C. 2 Am. Rep. 541.

<sup>4</sup> *Maneely v. M'Gee*, 6 Mass. 142. 2 Dan. Neg. Inst. § 1259.

*Noel v. Murray*, 3 Kern. 169.

<sup>5</sup> *Chrysler v. Renois*, 43 N. Y. 209.

Supreme Court of California,<sup>1</sup> plaintiff agreed orally to sell to defendant certain lands, part of which plaintiff had filed upon under the "Homestead Act," but for which he had not yet made final proof or payment. Afterwards plaintiff conveyed to defendant all the lands except the homestead tract, and defendant executed to plaintiff a note and mortgage for a balance of the purchase money. *Held*, in an action to foreclose the mortgage, that the contract was entire, and, being void because it embraced the homestead lands, the mortgage executed in pursuance of it could not be enforced. The court said: "That a contract to sell and convey lands taken up under the homestead laws, made before final proof, is illegal and void is not disputed. U. S. Rev. St § 2262. The learned counsel for appellant contend however that the oral agreement was void under § 1624, and subd. 5, Civil Code, as well as illegal under subdivisions 1, 2, § 1667, Id. Upon these propositions they contend that as all the negotiations, including the offer of defendant to purchase, and the acceptance of the offer by plaintiff, were oral, the execution of the deed by plaintiff, and of the note and mortgage by defendant on the 5th of March, 1887, not only eliminated the illegal element from the agreement, but that the execution of these instruments constituted the only contract between the parties, and superseded the oral negotiations or stipulations concerning the matter or subject referred to which preceded or accompanied their execution, and that what the subject-matter of the contract was is to be ascertained from the deed and mortgage. Citing Civil Code, § 1625. There is no doubt of the correctness of counsel's contention in a case to which section 1625 of the Civil Code applies; but that section has never been construed to prevent a defendant who has been sued on a promissory note, whether secured by mortgage or not, to show by parol evidence a want or failure or illegality of consideration."

### Sec. 71. Memoranda.

Parol evidence is admissible to show when, by whom, and in what circumstances a memorandum on a note was made.<sup>2</sup>

<sup>1</sup> 30 Pac. Rep. 1022.

<sup>2</sup> Bay v. Shrader, 50 Miss. 330.

Makepeace v. Harvard College, 10 Pick.  
298.

If the memorandum is established as part of the contract, parol evidence is inadmissible to vary it.<sup>1</sup> If repugnant and contradictory or indefinite, parol evidence is inadmissible to annex it.<sup>2</sup>

### Sec. 72. Obscurities.

Parol evidence is admissible to explain obscurities in the writing, whether intrinsic or the result of wear or accident.<sup>3</sup>

### Sec. 73. Guaranty.

An oral promise that a note is good and will be paid when due, made by the owner on a transfer of the note for value, is valid.<sup>4</sup>

### Sec. 74. Renewal.

Parol evidence is inadmissible to prove a contemporaneous agreement to renew; but otherwise if subsequent and upon a consideration, as between the original parties.<sup>5</sup>

### Sec. 75. Acceptance.

A bill may be orally accepted in the absence of a contrary statutory provision.<sup>6</sup>

### Sec 76. Waiver.

Parol evidence is competent to show a waiver by an indorser of presentment, demand, protest and notice, or to show any other excuse for the omission.<sup>7</sup>

<sup>1</sup> Heywood v Perrin, 10 Pick. 228.

<sup>2</sup> Way v. Batchelder, 129 Mass. 361.

Krouskop v. Shontz, 51 Wis. 204; S. C. 37 Am. Rep. 817.

<sup>3</sup> Paine v. Ringold, 43 Mich. 341.

County of Des Moines v. Hinkley, 62 Iowa 642

<sup>4</sup> Milks v. Rich, 80 N. Y. 269; S. C. 36 Am. Rep. 615.

King v. Summitt, 73 Ind. 312; S. C. 38 Am. Rep. 145.

<sup>6</sup> Grafton Bank v. Woodward, 5 N. H. 99  
Fleming v. Gilbert, 3 Johns 528.

Mills Co. Nat. Bank v. Perry, 72 Iowa 15; S. C. 2 Am. St. Rep. 228.

Heist v. Hart, 73 Pa. St. 286.

McGrath v. Barnes, 13 S. C. 328; S. C. 36 Am. Rep. 687.

Ellis v. Hamilton, 4 Sneed, 512.

<sup>7</sup> Fairlie v. Herring, 11 Moore, 520.

Ward v. Allen, 2 Metc. 53.

Clarke v. Gordon, 3 Rich. 311.

Jarvis v. Wilson, 46 Conn. 90; S. C. 33 Am. Rep. 18.

<sup>7</sup> Dan. Neg. Inst. 4th ed. sec. 1093.

As by proof of the indorser's promise, at the time of indorsing, to pay the note.<sup>1</sup> Or after dishonor.<sup>2</sup> Or to save the expense of protest.<sup>3</sup> Or by proof that the indorser has been fully secured for the payment.<sup>4</sup> Or that he threw the holder off his guard.<sup>5</sup> Or in the case of a check that the drawer had no funds at the bank.<sup>6</sup> And this may not be countervailed by proof of the willingness of the bank to pay.<sup>7</sup>

But parol evidence is not admissible to show a contemporaneous waiver, by a guarantor, of the prior exhausting of the remedies against the principal.<sup>8</sup> Nor to vary the terms of a waiver. Thus where there was a "waiver" of "notice of protest," oral evidence was held inadmissible to add a waiver of demand of payment.

In this case the court said: "There could be no doubt, I think, if this were a contract, that evidence of the *colloquium* which led to the entry would be inadmissible, especially for the purpose of modifying or changing the effect of what was expressed in the writing. Assume that the parties conversed about a waiver of demand and notice, and finally reduced their agreement to writing, which reads, 'Notice of protest waived by me;' if this were a contract upon sufficient consideration, it would scarcely be pretended that the plaintiffs, in seeking to avail themselves of the

<sup>1</sup> Barclay v. Weaver, 19 Pa. St. 396; S. C. 57 Am. Dec. 661.

Cummings v. Kent, 44 Ohio St. 96.

Schmied v. Frank, 86 Ind. 255.

Lane v. Steward, 20 Me. 98.

Hazard v. White, 26 Ark. 155.

Boyd v. Cleveland, 4 Pick. 525.

Taylor v. French, 2 Lea, 260; S. C. 31 Am. Rep. 609.

Dye v. Scott 35 Ohio St. 194; S. C. 35 Am. Rep. 604.

*Contra*: Barry v. Morse, 3 N. H. 132.

Kern v. VonPhul, 7 Minn. 426.

Farwell v. St. Paul Trust Co. 45 Minn. 495; S. C. 22 Am. St. Rep. 742.

Beeler v. Frost, 70 Mo. 185.

<sup>2</sup> Oxnard v. Varnum, 111 Pa. St. 193; S. C. 56 Am. Rep. 255.

Bogart v. McClung, 11 Heisk. 105; S. C. 27 Am. Rep. 737.

Ross v. Hurd, 71 N. Y. 14; S. C. 27 Am. Rep. 1.

<sup>3</sup> Robinson v. Barnett, 18 Fla. 602; S. C. 43 Am. Rep. 327.

<sup>4</sup> Wright v. Andrews, 70 Mo. 86; S. C. 35 Am. Rep. 308.

<sup>5</sup> Boyd v. Bank of Toledo, 32 Ohio St. 526; S. C. 30 Am. Rep. 624.

<sup>6</sup> Fletcher v. Pierson, 69 Ind. 281; S. C. 35 Am. Rep. 214.

It was held in House v. Vinton Nat. Bank, 43 Ohio St. 346; S. C. 54 Am. Rep. 813, two judges dissenting, that notice of protest is not dispensed with by the fact that the indorser has made a general assignment for the benefit of creditors. This seems rather opposed to the opinion of the text writers. See note, 54 Am. Rep. 818.

<sup>7</sup> Culver v. Marks, 122 Ind. 554; S. C. 17 Am. St. Rep. 377.

<sup>8</sup> Allen v. Rundle, 50 Conn. 9; S. C. 47 Am. Rep. 599.

Stone v. Rockefeller, 29 Ohio St. 625.

<sup>9</sup> Buckley v. Bentley, 48 Barb. 283.

contract in a court of law, would be permitted to go back of the writing and prove that the agreement comprehended a waiver of demand of payment, as well as notice of non-payment. It would not be the case of a contract resting partly in writing and partly in parol, when oral proof would be admissible to supply the deficiency in the writing; for manifestly the writing was intended to express the entire agreement. The parties have put the agreement which they made on the subject of what should be waived into writing, and are to be deemed to have given thereby full expression to their meaning, and hence parol evidence of their language contradicting, varying or adding to that which is contained in the written instrument, must be excluded. 1 Greenl. Ev. sec. 282. Renard v. Sampson, 12 N. Y. 561. That there was no consideration for the agreement, cannot change the rule of evidence, in regard to what shall be competent proof of what the agreement was. It is a rule of evidence applicable to the mode of proving a fact, and whether that fact is a contract or a waiver, it seems to me can make no difference with reference to its applicability. This principle was held in Halliday v. Hart, 30 N. Y. 474. If the principle adverted to applies to this case, the written entry on the note must be taken as the evidence of what the parties finally agreed upon as to the waiver, and the plaintiffs had no right to rely on what had been said in reference to a waiver of demand. It follows that the admission of parol evidence of the prior and contemporaneous conversations on the subject between the parties was erroneous." One of the four judges dissented. The decision comes within the rule laid down in the chapter as to incomplete agreements, that the subject of waiver having been specified in the writing, and certain things having been waived, the writing must conclusively be deemed complete on that subject, and no oral addition may be made to the things waived.

### Sec. 77. Alteration.

Parol evidence is competent to prove material alterations, even as against a *bona fide* holder, and to explain alterations.<sup>1</sup>

<sup>1</sup> Brown v. Straw, 6 Neb. 536; S. C. 29 Am. Rep. 369.

McCauley v. Gordon, 64 Ga. 221; S. C. 37 Am. Rep. 68.

First Nat. Bk. v. Fricke, 75 Mo. 178; S. C. 42 Am. Rep. 397.

Nicholson v. Combs, 90 Ind. 515; S. C. 46 Am. Rep. 229.

**Sec. 78. Forgery—ratification.**

Parol evidence is competent to show forgery or ratification of a forged signature.<sup>1</sup>

When the name of one maker of a joint note has been forged, another maker, although only a surety and signing in the belief that the forged name is genuine, is nevertheless bound to an innocent payee.<sup>2</sup> One whose name is signed to a note by another as surety, without his knowledge or authority, is not rendered liable by his promise to the payee after transfer to pay it.<sup>3</sup> A promise, by one whose indorsement on a note is forged, to pay the same, is void as against public policy.<sup>4</sup> A mere promise to pay a forged note, when such promise is given by the supposed maker of the note without any new consideration, and after the promisee has acquired the note, is not binding.<sup>5</sup> The defendant, whose name had been forged as surety on a note, on being shown the note by the owner admitted that the signature was genuine, and promised to pay the note, supposing that he had signed the note. The owner was thus induced to forbear suit until the maker became insolvent. *Held*, that the defendant was estopped from setting up that his signature was forged.<sup>6</sup> An indorser may not set up the forgery of any precedent signature.<sup>7</sup> But he may allege the forgery of a subsequent indorsement to a holder to whom he has paid the paper, and recover back.<sup>8</sup>

Aldrich v. Smith, 37 Mich. 468; S. C. 26 Am. Rep. 536.

Laub v. Paine, 46 Iowa, 550; S. C. 26 Am. Rep. 163.

Vaughan v. Fowler, 14 S. C. 355; S. C. 37 Am. Rep. 731.

Jones v. Bangs, 40 Ohio St. 139; S. C. 48 Am. Rep. 664.

Charlton v. Reed, 61 Iowa, 166; S. C. 47 Am. Rep. 808.

Hartley v. Corboy, — Pa. —; 24 Atl. Rep. 295.

<sup>1</sup> Wilbur v. Stoepel, 82 Mich. 344; S. C. 21 Am. St. Rep. 568.

<sup>2</sup> Helms v. Wayne Agl. Co., 73 Ind. 325; S. C. 38 Am. Rep. 147.

<sup>3</sup> Owsley v. Philips, 78 Ky. 517; S. C. 39 Am. Rep. 258.

<sup>4</sup> Shisler v. Vandike, 92 Penn. St. 447; S. C. 37 Am. Rep. 702.

<sup>5</sup> Workman v. Wright, 33 Ohio St. 405; S. C. 31 Am. Rep. 546.

<sup>6</sup> Rudd v. Matthews, 79 Ky. 479; S. C. 42 Am. Rep. 231.

<sup>7</sup> Star Ins. Co. v. Bank, 60 N. H. 445.

State Bank v. Fearing, 16 Pick. 533.

Bell v. Dagg, 60 N. Y. 528.

Hannum v. Richardson, 48 Vt. 508.

Condon v. Pearce, 43 Md. 83.

Cochran v. Atchison, 27 Kans. 732.

Dan. Neg. Inst., 4th ed., § 672.

<sup>8</sup> Dan. Neg. Inst., 4th ed., § 1357.

Canal Bank v. Bank of Albany, 1 Hill, 287.



**Sec. 79. Fraud.**

Parol evidence is admissible as between the original parties to show fraud or duress, and so as to third parties with notice, or without having paid value.<sup>1</sup>

But duress of the maker will not relieve a voluntary indorser for value.<sup>2</sup>

**Sec. 80. Mistake.**

Parol evidence is admissible between the original parties to show mistake and to have it corrected.

As in the amount.<sup>3</sup> Or in the form of liability.<sup>4</sup> Or in the fact of liability.<sup>5</sup> Or in the date.<sup>6</sup> But not to show that the party intended to contract for a different liability.<sup>7</sup> Equity will not correct a note for a mutual mistake as to the legal effect. As where the parties supposed the note would bear the conventional rate of interest, in excess of the legal rate, after maturity.<sup>8</sup> Or when a surety gave a new note, both parties being ignorant of the legal effect of the action of his principal to release him.<sup>9</sup>

**Sec. 81. Bona fide holding.**

Parol evidence is competent to prove or disprove that a third party paid value and took without notice of defenses, in the usual course of business.<sup>10</sup>

**Sec. 82. Indorsers estopped.**

An indorser may not dispute the validity of the maker's signature as against an innocent holder for value.

<sup>1</sup> Phillips v. Meily, 106 Pa. St. 536.

Gross v. Drager, 66 Wis. 150; 28 N. W. Rep. 141.

Ormsbee v. Howe, 54 Vt. 182; S. C. 41 Am. Rep. 841.

Millard v. Barton, 13 R. I. 601; S. C. 43 Am. Rep. 51.

<sup>2</sup> Bowman v. Hiller, 130 Mass. 153; S. C. 39 Am. Rep. 442.

<sup>3</sup> Claxon v. Demaree, 14 Bush, 173.

<sup>4</sup> Hopkins v. Ins. Co., 57 Iowa, 204.

<sup>5</sup> Southall v. Rigg, 11 C. B. 481.

<sup>6</sup> Paysant v. Ware, 1 Ala. (N. S.) 160.

<sup>7</sup> Prosser v. Luqueer, 4 Hill, 420; S. C. 40 Am. Dec. 288.

Cook v. Brown, 62 Mich. 474; S. C. 4 Am. St. Rep. 870.

<sup>8</sup> Rector v. Collins, 46 Ark. 167; S. C. 55 Am. Rep. 571.

<sup>9</sup> Churchill v. Bradley, 58 Vt. 403; S. C. 56 Am. Rep. 563.

<sup>10</sup> Chrysler v. Renois, 43 N. Y. 209.

As in case of a copartnership signing.<sup>1</sup> Or of a married woman's note.<sup>2</sup> Or of an infant's note.<sup>3</sup>

### Sec. 83. Relations of parties.

Parol evidence is competent, between the immediate parties, to show their real relation, and in respect to third parties, that such relation was known to them, although different from the apparent relation.

" Nothing is more common than to introduce evidence of the real and true relation of parties to each other whose names are on negotiable paper, where *prima facie* the position or order of signature makes a contract different from the true relations of the parties. The proper inquiry is, who among the parties is to pay the debt." <sup>4</sup>

Thus an apparent maker may show that the holder knew him to be a mere surety.<sup>5</sup> So in a suit by indorsee against indorser the latter was permitted to show that the plaintiff, for the makers, paid the amount of the note to the defendant holders, and that thereafter, and after delivery of the note to the plaintiff for the makers, the defendant, at plaintiff's request, indorsed with the express understanding, that it was to be used by plaintiff only as evidence to the makers that he had paid the note.<sup>6</sup> So as against the holder, the payee may show he indorsed after payment, at plaintiff's request, as evidence of payment.<sup>7</sup> Or that an apparent maker signed as surety, in order to let in the defense of discharge by extension of time to the principal.<sup>8</sup> Defendant indorsed to C., and C. to plaintiff. The note was secured by mortgage, and C. had foreclosed a junior mortgage and bought in

<sup>1</sup> Dalrymple v. Hillenbrand, 62 N. Y. 5; S. C. 20 Am. Rep. 438.

Montgomery v. Crossthwait, 90 Ala. 553; S. C. 24 Am. St. Rep. 832.

<sup>2</sup> Edmunds v. Rose, 51 N. J. L. 547; S. C. 14 Am. St. Rep. 704.

Davis v. Statts, 43 Ind. 103; S. C. 13 Am. Rep. 382.

Winn v. Sanford, 145 Mass. 302; S. C. 1 Am. St. Rep. 461.

<sup>3</sup> Motteux v. St. Aubin, 2 W. Bl. 1133.

<sup>4</sup> Colgrove v. Rockwell, 24 Conn. 584.

<sup>5</sup> Irvine v. Adams, 48 Wis. 468; S. C. 33 Am. Rep. 817.

Howell v. Sevier, 1 Lea, 360; S. C. 27 Am. Rep. 771.

Harmon v. Hale, 1 Wash. 422; S. C. 34 Am. Rep. 816.

Hubbard v. Gurney, 64 N. Y. 457; overruling Campbell v. Tate, 7 Lans. 370, and Benjamin v. Arnold, 2 Hun, 447.

<sup>6</sup> Morris v. Faurot, 21 Ohio St. 155; S. C. 8 Am. Rep. 45.

<sup>7</sup> Spencer v. Sloan, 108 Ind. 183; S. C. 58 Am. Rep. 35.

<sup>8</sup> Hubbard v. Gurney, 64 N. Y. 457.

the property. Evidence was admitted to show that C. bought to relieve his property, and agreed with defendant that he was not to be liable.<sup>1</sup> A note payable to the order of "myself," signed by two, and placed by one in the hands of the other to be negotiated for his own benefit, may be transferred by indorsement by that other alone; parol evidence is competent to show the circumstances; and it makes no difference that the maker not indorsing was surety, and that the transferee knew that fact.<sup>2</sup> So where a note payable to "order of myself," was signed by two, evidence was admitted to show which was payee and that the other was surety.<sup>3</sup> A payee-indorser may show, as against an indorsee, that he indorsed to enable the party to whom he delivered the note to collect it for the defendant, although that party sold it to the plaintiff, who filled up the indorsement to himself.<sup>4</sup> Accommodation indorsers may show their relation by parol, and enforce contribution.<sup>5</sup> One who indorsed in blank after maturity, sued by endorsee, may show the latter's agreement to have recourse to him only after failure to collect from the maker.<sup>6</sup> Evidence is competent to show that several indorsed successively for accommodation, to obtain a discount for one of the parties.<sup>7</sup>

*Actions for contribution:* In Norton v. Coons, 6 N. Y. 33, two having signed a note as sureties evidence was held incompetent to show that they signed at different times, without communication with each other, and that the principal agreed with the latter that he should not be surety except for the prior signers. But this is distinguished in Wells v. Miller, 66 N. Y. 255, where evidence was admitted to show the relations of the parties and facts affecting the equities. And in

<sup>1</sup> McCallum v. Jobe, 9 Baxt. 168; S. C. 40 Am. Rep. 84.

<sup>2</sup> First Nat. Bank v. Fowler, 36 Ohio St. 524; S. C. 38 Am. Rep. 610.

<sup>3</sup> Jenkins v. Bass, 88 Ky. 397; S. C. 21 Am. St. Rep. 344.

<sup>4</sup> Rhodes v. Risley, N. Chip. 44; S. C. 1 Am. Dec. 696.

Johnson v. Martinus, 4 Halst. 144; S. C. 17 Am. Dec. 464; overruled in Chaddock v. Vanness, 35 N. J. L. 517; S. C. 10 Am. Rep. 256.

<sup>5</sup> Daniel v. McRae, 2 Hawks, 590; S. C. 11 Am. Dec. 787.

Farwell v. Ensign, 66 Mich. 600.

<sup>6</sup> Miner v. Robinson, 1 D. Chip. 392; S. C. 12 Am. Dec. 694.

<sup>7</sup> Pitkin v. Flanagan, 23 Vt. 160.

To the same effect generally under this rule:

Craythorne v. Swinburne, 14 Ves. 160.

Oldham v. Broom, 28 Ohio St. 41.

Adams v. Flanagan, 36 Vt. 400.

Sisson v. Barrett, 2 N. Y. 406.

Williams v. Glenn, 92 N. C. 253.

Wood v. Matthews, 73 Mo. 477.

Hyler v. Nolan, 45 Mich. 357.

Crosby v. Wyatt, 23 Me. 156.

Mech. Bank v. Bank, 5 Wheat. 326.

Lacy v. Lofton, 26 Ind. 324.

Sayles v. Sims, 73 N. Y. 553, where a joint and several note was signed by three, the word "surety" being added to the signature of the last signer, in an action for contribution, it was held that he might show that he was surety for only one, and that the second signer was also a surety. The same in *Chapeze v. Young*, 87 Ky. 477; *Oldham v. Broom*, 28 Ohio St. 41. Of *Norton v. Coons*, *supra*, it is said, in *Houck v. Graham*, 106 Ind. 195; S. C. 55 Am. Rep. 727, that its doctrine "has been often denied, and in effect, though not in terms, is overruled by the case of *Wells v. Miller*, *supra*." But it is again cited, without disapproval, in *Sayles v. Sims*, *supra*. In an action by an apparent principal against an apparent surety on a sealed note for contribution, evidence is competent to show that both were principals.<sup>1</sup> But where an indorser, who has paid the note, sues another indorser for contribution, the latter may show that all indorsed for accommodation and agreed to be co-sureties.<sup>2</sup> Where husband and wife make a note it may be shown by parol for whose debt it was given.<sup>3</sup>

#### Sec. 84. Showing relations as to third parties.

But the apparent relation of the parties may not be changed nor their agreement shown by parol to the detriment of an innocent and ignorant third party.

So an apparent principal may not show himself a mere surety, as to an innocent payee.\* So one who signs a negotiable note, complete on its face, as surety, and delivers it to the maker on the condition that he shall procure the signature of a certain other person as surety before delivery to the payee, cannot set up the non-fulfillment of that condition as against the payee who was ignorant of it.<sup>5</sup> Nor may an accommodation endorser show that he was a mere surety.<sup>6</sup> A regular indorser, or one apparently regular, may not vary his liability by proof of his own intention or agreement of the parties, nor show that his indorsement was

<sup>1</sup> *Williams v. Glenn*, 92 N. C. 253; S. C. 53 Am. Rep. 416.

<sup>2</sup> *Easterly v. Barber*, 66 N. Y. 433.

<sup>3</sup> *Schofield v. Jones*, — Ga. —; 44 Alb. L. J. 418.

See generally, notes, 29 Eng. Rep. (Moak), 224, 34 id. 236.

<sup>4</sup> *Hoge v. Lansing*, 35 N. Y. 136.

*McCloskey v. Ind. etc. Union*, 67 Ind. 86; S. C., 33 Am. Rep. 76.

*Exeter Bank v. Stowell*, 16 N. H. 61; S. C. 41 Am. Dec. 716.

<sup>5</sup> *Jordan v. Jordan*, 10 Lea, 124; S. C. 43 Am. Rep. 294.

<sup>6</sup> *Stephens v. Monongahela Nat. Bk.* 88 Pa. St. 157; S. C. 32 Am. Rep. 438.

special or not regular. As that he indorsed simply to identify the payee, or without recourse.<sup>1</sup> This doctrine is well laid down by Elliott, J., in *Stack v. Beach*, 74 Ind. 571; S. C. 39 Am. Rep. 113, where the contention was to show that the indorsement was merely to identify the payee. The court said: "There is some conflict in the decisions of other courts, but the weight of authority is with the holding of our court, that the indorsement is a written contract, and within the rules of evidence ordinarily applicable to such contracts. The cases which hold the contrary doctrine proceed upon the theory that the contract is implied by law, and is not set out in writing, but this doctrine cannot be reconciled with fundamental principles. The reason upon which rests the rule sanctioned by this and many other courts is thus well and accurately stated in *Woodward v. Foster*, 18 Gratt. 200: 'When the legal import of a contract is clear and definite, the intention of the parties is for all substantial purposes as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed.' There is an important exception to the general rule that an indorsement cannot be varied or contradicted by parol evidence. Parol evidence is admissible for the purpose of showing that the indorsement created a trust. Thus it may be shown that a prin-

<sup>1</sup> *Stack v. Beach*, 74 Ind. 571; S. C. 39 Am. Rep. 113.

*Doolittle v. Ferry*, 20 Kans. 230; S. C. 27 Am. Rep. 166.

*Martin v. Cole*, 104 U. S. 30.

*Good v. Martin*, 95 U. S. 95.

*Goodwin v. Davenport*, 47 Me. 112; S. C. 74 Am. Dec. 478.

*Carpenter v. McLaughlin*, 12 R. I. 270; S. C. 34 Am. Rep. 638.

*Hall v. Newcomb*, 7 Hill, 416; S. C. 42 Am. Dec. 82.

*Thacher v. Stevens*, 46 Conn. 561; S. C. 33 Am. Rep. 39.

*Charles v. Denis*, 42 Wis. 56; S. C. 24 Am. Rep. 383.

*Wright v. Remington*, 12 Vroom, 48; S. C. 32 Am. Rep. 180.

*Williams v. Bank*, 67 Tex. 607.

*Bigelow v. Colton*, 13 Gray, 309; S. C. 74 Am. Dec. 633.

*Knoblauch v. Foglesong*, 38 Minn. 352, *Farr v. Ricker*, 46 Ohio St. 265.

*Smythe v. Scott*, 106 Ind. 245.

principal indorsed to an agent for the purpose of allowing the latter to use the bill for some particular purpose. *Dale v. Gear*, 38 Conn. 15; S. C. 9 Am. Rep. 353; *Chaddock v. Vanness*, 35 N. J. L. 517; S. C. 10 Am. Rep. 256. So it has been held that the indorsement may be shown to have been for collection merely, and that the instrument was delivered as an escrow upon an express condition not performed. *Ricketts v. Pendleton*, 14 Md. 320; *McWhirt v. McKee*, 6 Kans. 412; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Bell v. Lord Ingestre*, 12 Q. B. 317. It is upon this general doctrine that the holding in *Hazzard v. Duke*, 64 Ind. 220, that it may be shown by parol evidence that the instrument was indorsed as collateral security can be fully sustained. The principle that parol evidence is competent for the purpose of showing a trust is by no means confined to contracts of indorsements. *Whart. Ev.* sec. 903. A familiar illustration of this general doctrine is supplied by the numerous cases holding that a deed absolute on its face may be shown to be a mortgage. The cases which hold, that as between the parties who execute or indorse the bill the true relationship may be shown, do not trench upon the rule that an indorsement cannot be varied by parol evidence. The rights of such parties may be tried between themselves, but the rights of the holders cannot be thereby affected. *Houston v. Bruner*, 39 Ind. 376. Nor do those cases which hold that where the indorsement is made by a third person, prior to an indorsement by the payee, parol evidence is admissible to show the character of the indorser's undertaking, have any bearing upon the question here under discussion. The contract in such a case is unlike that of a full contract created by writing the name after the payee has regularly indorsed the instrument. The indorsement of a note or bill not previously indorsed or not indorsed at all by the payee is an irregular proceeding, and the contract created by it is not one of fixed and definite legal import. An indorsement regularly following that of the payee does constitute a certain and defined contract, with a legal force and meaning quite as complete and certain as if all the conditions and stipulations of the contract had been written out at full length. This is substantially the doctrine declared in *Vore v. Hurst*, 13 Ind. 551, and which has been sanctioned by a long and unbroken line of decisions. There are many adjudicated cases declaring and enforcing the principle upon which our cases are bottomed. Among them are *Brown v. Spofford*, 95 U. S. 474; *Specht v. Howard*, 16 Wall. 564; *Howe*

v. Merrill 5 Cush. 80; Bigelow v. Colton, 13 Gray, 309; Wright v. Morse, 9 id. 337; Crocker v. Getchell, 23 Me. 392; Tankersley v. Graham, 8 Ala. (N. S.) 247."

In *Martin v. Cole* it was held that it is not competent in an action against an indorser by his immediate indorsee upon an indorsement made in blank, of a negotiable promissory note, to prove as a defense that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse. *Matthews, J.*, said :

"My conclusion on this point therefore is that it is a general rule of law that a blank indorsement, as between an indorser and his immediate indorsee, creates a definite contract in writing, as to such parties, which cannot be modified by a contemporaneous oral agreement. This result would seem, upon principle, decisive of the question, arising in the present case, yet nevertheless there is another subject which cannot be properly passed in silence, for there are decisions which cannot fail to command much respect, which hold that as between an accommodation indorser and indorsee, the form of the note is not conclusive, and that in that connection parol evidence is admissible. The first of the cases here alluded to is that of *Phillips v. Preston*, 5 How. 278, and it is not to be denied that it is exactly to the purpose, for it explicitly declares that an agreement between first and second indorsers for the accommodation of the maker, to share the loss equally, made at the time of indorsing the note, may be proved by parol. In that case, as in the present one, the first indorser had paid the note, and the suit was by him against the indorsee for contribution, on the ground that such was the oral understanding. I have examined this case with care, and although yielding to it all the deference that of right belong to so high an authority, have altogether failed to be able to concur in the principles and reasoning on which its conclusion rests. The theory by which the result reached its attempted to be justified is this: That the suit is not upon the contract arising by law out of the act of indorsing, but on what is called the collateral oral arrangement. The rule is plainly admitted that written evidence cannot be altered by parol. To show in what distinct terms this admission is made, and also the rule of decision, the following quotation will suffice: Alluding to the extrinsic testimony, the opinion says: 'Were the action on the notes, and this evidence offered to contradict them, it would

be entirely different, because in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports.

\* \* \* So between contending parties likewise, all prior conversation is supposed, so far as binding, to be embodied in the written contract \* \* \* But the parol evidence here is not offered in any action on the note, or to alter its terms or its indorsements, nor is any prior or contemporaneous conversation offered to vary the note or its indorsement, in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires, and this evidence is plenary and entirely satisfactory to substantiate the separate contract.' It will be observed that this reasoning admits the fact the indorsement constituted a definite contract, in writing, between the parties to the litigation, and that if the action was on that written contract the parol evidence would have been inadmissible, and it then asserts that there is what the opinion calls a collateral contract, upon which the suit was based. Now, what seems to me impossible to concede, is that on the facts stated there existed two legal contracts—an oral one and a written one. How can this be so, when the one is contradictory of the other? The written contract bound this first indorser, with reference to the rights of the indorsee, to pay the whole note; the oral contract bound him to pay only half. Such stipulations relate to the same subject-matter, and they cannot stand together and the consequence is it must be conclusively presumed that the parties did not intend to establish such inconsistencies. Such a juncture presents nothing but the ordinary case of a conflict between the oral and written evidence; in that case the former requiring the first indorsee to pay the entire claim, and the latter binding him only to bear a moiety of it. It seems to me that it would despoil the rule, which is prohibitive of parol evidence in such matters, of much of its practical benefit, if the oral engagement, variant from the written one, can lay a separate ground of action. Such a principle would enable a person at his option to sue on a written contract or on a contemporaneous oral contract. The hypothesis on which the rule which excludes on such occasions contemporaneous oral stipulations, is the peremptory assumption that the parties at the given time, with respect to the same subject-matter, entered into but a single agreement. The reported case assumes that the first indorsee, in the same transaction and



at the same time, agreed to pay the whole, and at the same time stipulated that he should pay only one-half of the money in question. In my opinion, upon principles thoroughly established, under the circumstances stated, the written indorsement constituted the only legal evidence that could be resorted to. The other cases in which the doctrine which I have here sought to controvert has been maintained, are those of *Weston v. Chamberlin*, 7 Cush. 404, and *Clapp v. Rice*, 13 Gray, 403; but it is not necessary to notice them further than to say that in neither of them does the subject appear to have been independently considered; the point in question being disposed of in a few words, and the only pertinent authority cited being that of *Phillips v. Preston*, which is above discussed. In the case now before the court, as I read the undertaking of the plaintiff, by force of his prior indorsement he agreed in writing to pay the whole of this money, so far as the defendant is concerned, and he cannot alter that agreement by the oral testimony in question."

And so it has been held that a regular indorser may not show that the payee, on transferring the note by indorsement, orally agreed to assume the payment of it.<sup>1</sup> Nor that the indorser indorsed merely to pass title and with no intention of becoming liable.<sup>2</sup> Nor in a suit by a remote indorsee against a payee who indorsed in blank, that it was agreed between the payee and his immediate indorser that the payee should not be liable.<sup>3</sup> Nor that the holder agreed not to hold the acceptor.<sup>4</sup> Nor that the payee agreed not to hold the maker, indorser or guarantor.<sup>5</sup> Nor that a second accommodation indorser agreed to be jointly liable with the first accommodation indorser.<sup>6</sup> Nor may an accommodation indorser show an agreement between the maker and himself to insert a certain place of payment in a note which provided for none, although the holder knew of the agreement.<sup>7</sup>

*Contrary authority:* On the other hand it has been held that parol evidence is admissible to show that the indorsee agreed not

<sup>1</sup> *Rodney v. Wilson*, 67 Mo. 123; S. C. 29 Am. Rep. 499.

*Doolittle v. Ferry*, 20 Kans. 230; S. C. 27 Am. Rep. 166.

<sup>2</sup> *Day v. Thompson*, 65 Ala. 273.

<sup>3</sup> *Hill v. Shields*, 81 N. C. 250; S. C. 31 Am. Rep. 499.

<sup>4</sup> *Davis v. Randall*, 115 Mass. 547; S. C. 15 Am. Rep. 146.

<sup>5</sup> *Wright v. Remington*, 12 Vroom, 48; S. C. 32 Am. Rep. 180.

<sup>6</sup> *Johnson v. Ramsey*, 43 N. J. L. 279.

<sup>7</sup> *Parker v. Sutton*, 103 N. C. 191; S. C. 14 Am. St. Rep. 795.

to come upon the indorser.<sup>1</sup> And that the payee agreed to look only to the maker.<sup>2</sup> And to show that an indorser in blank was not to be liable as a joint promisor, but only in case the maker failed to pay.<sup>3</sup> And to show that an indorsement was merely to pass title, and that the indorsee agreed not to hold the indorser.<sup>4</sup> And that an indorsement was understood by all the parties to be only for collection.<sup>5</sup> And that it was agreed by all the parties that the indorser should not be liable.<sup>6</sup> And that two indorsers agreed to be jointly liable.<sup>7</sup> And where the owner indorsed in blank, he was permitted to show the agreement of the transferee that he was not to be liable in a certain event.<sup>8</sup> And that the holder agreed not to look to the surety.<sup>9</sup> G. made a note payable to the order of J., and procured M. to indorse it, agreeing to procure the indorsement of J. as payee before negotiating it. Without doing so he transferred it to plaintiff, and it came to maturity and was protested without such indorsement. *Held*, that M. was not liable to plaintiff as indorser.<sup>10</sup>

## Sec. 85. Irregular indorsement before payee.

In the case of an irregular indorsement before the payee, as between the immediate parties parol proof is competent to establish their real position and relations, and show their agreement and intention.

This is put on the ground "that the position of the name on the paper is one of ambiguity in itself—that it is not a complete

<sup>1</sup> Hill v. Ely, 5 S. & R. 363; S. C. 9 Am. Dec. 376.

<sup>2</sup> Cake v. Pottsville Bank, 116 Pa. St. 264; S. C. 2 Am. St. Rep. 600.

<sup>3</sup> Barrows v. Lane, 5 Vt. 161; S. C. 26 Am. Dec. 293.

Perkins v. Catlin, 11 Conn. 213; S. C. 29 Am. Dec. 282.

Bright v. Carpenter, 9 Ohio, 139; S. C. 34 Am. Dec. 432.

<sup>4</sup> Bruce v. Wright, 5 Thomp. & Cook, 81. Brewer v. Woodward, 54 Vt. 581; S. C. 41 Am. Rep. 857.

<sup>5</sup> Downer v. Cheesebrough, 36 Conn. 39; S. C. 4 Am. Rep. 29.

<sup>6</sup> Breneman v. Furniss, 90 Pa. St. 186; S. C. 35 Am. Rep. 651.

Cole v. Smith, 29 La. Ann. 551; S. C. 29 Am. Rep. 343.

*Contra*: Sanborn v. Southard, 25 Me. 409; S. C. 43 Am. Dec. 288.

Vore v. Hurst, 13 Ind. 551; S. C. 74 Am. Dec. 268.

Fuller v. McDonald, 8 Greenl. 213; S. C. 23 Am. Dec. 499.

<sup>7</sup> Ross v. Espy, 66 Pa. St. 481; S. C. 5 Am. Rep. 394.

<sup>8</sup> Brewer v. Woodward, 54 Vt. 581; S. C. 41 Am. Rep. 857.

Graves v. Johnson, 48 Conn. 160; S. C. 40 Am. Rep. 162.

<sup>9</sup> Kulenkamp v. Groff, 71 Mich. 675; S. C. 15 Am. St. Rep. 283.

<sup>10</sup> Gibson v. Miller, 29 Mich. 355; S. C. 18 Am. Rep. 98.

contract as is the case of an indorsement by the payee, which imports a distinct and certain liability; but rather evidence of authority to write over it the contract that was entered into; and that parol proof merely discloses and brings to light the terms of the unwritten contract that was made between the parties.<sup>1</sup> The point is very learnedly examined in *Burton v. Hansford*, 10 W. Va. 470; S. C. 27 Am. Rep. 571, where the court said: "There is perhaps no legal subject upon which there has been a greater diversity of opinion than the question, what is the liability of a stranger to a note, who signs his name on the back thereof. In many of the States it has been decided that when a stranger signs his name on the back of a note before its delivery, he is *prima facie* liable, as though he was an original promisor. This is held to be law in Maine, *Childs v. Wyman*, 44 Me. 433; in Vermont, *Sylvester v. Downer*, 20 Vt. 355; in Rhode Island, *Perkins v. Barstow*, 6 R. I. 505; in Massachusetts, *Chaffee v. Jones*, 19 Pick. 260; in New Hampshire, *Currier v. Fellows*, 27 N. H. 366; in Indiana, *Cecil v. Mix*, 6 Ind. 478; in Michigan, *Rothschild v. Grix*, 31 Mich. 150; 18 Am. Rep. 171; in Minnesota, *Peckham v. Gilman*, 7 Minn. 446; in Texas, *Carr v. Rowland*, 14 Tex. 275, and in Louisiana, *Collins v. Trist*, 20 La. Ann. 348. In other States it is held that a party so signing is *prima facie* not an original promisor, but a guarantor. It is so held in Illinois, *Webster v. Cobb*, 17 Ill. 459; in Connecticut, *Ranson v. Sherwood*, 26 Conn. 437; and in Ohio, *Greenough v. Smead*, 3 Ohio St. 415, but in these States there is a difference in the extent of the liability of such guarantor. In other States it is held that such an indorsement by a stranger of negotiable paper before the delivery to the payee does not *prima facie* make the party liable, either as an original promisor or as a guarantor, but only as an indorser, and therefore not liable to the payee, who occupies the position of a first indorser. This is held in New York, *Herrick v. Carman*, 12 Johns. 160; in Pennsylvania, *Fegenbush v. Lang*, 28 Penn. St. 194; in

<sup>1</sup> Dan. Neg. Inst. 4th ed., § 711.

*Owings v. Baker*, 54 Md. 82; S. C. 39 Am. Rep. 353.

*Taylor v. French*, 2 Lea, 257; S. C. 31 Am. Rep. 609.

*Houck v. Graham*, 106 Ind. 195; S. C. 55 Am. Rep. 727.

*Chaddock v. Vanness*, 35 N. J. L. 517; S. C. 10 Am. Rep. 256.

*Kealing v. Vansickle*, 74 Ind. 529; S. C. 39 Am. Rep. 101.

*Fullerton v. Hill*, — Kans. —; 29 Pac. Rep. 583.

*Eilbert v. Finkbeiner*, 68 Pa. St. 243; S. C. 8 Am. Rep. 176.

*Deering & Co. v. Creighton*, 19 Oreg. 118; S. C. 20 Am. St. Rep. 800.

Iowa, *Fear v. Dunlap*, 1 G. Greene, 331. In California and Mississippi, the payee of a negotiable note may sue a stranger who has indorsed it, his liability being *prima facie* that of an indorser, and not that of either a guarantor or original promisor. *Jennings v. Thomas*, 13 Sm. & Marsh. 617; *Pierce v. Kennedy*, 5 Cal. 138. In New York, where the decisions have been very inconsistent, it is now held that where the note is not negotiable, and is indorsed by a third party before it is delivered to the payee, he may be held liable as an original promisor or as a guarantor. *Cromwell v. Hewitt*, 40 N. Y. 491. In Massachusetts now, parol evidence would not be even admissible to show that a stranger who put his name on the back of a negotiable note when it was made, did not thereby intend to bind himself as an original promisor. *Way v. Butterworth*, 108 Mass. 509.

“In the case of *Rey v. Simpson*, 22 How. 341, Clifford, J., in delivering the opinion of the court, states the law thus: ‘When a promissory note, made payable to a particular person or order, is first indorsed by a third person, as in this case such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name thereon at the request of the maker pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then only be liable as second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers.’ It would be vain to endeavor to draw from this great mass of conflicting decisions any general principle which would meet with general support, I shall therefore attempt no review of these cases, no good would result from such review, and indeed the review of the decisions of a single State would, in many instances, lead to the conclusion that the inconsistencies of the decided cases were so great that no

clear principle could be deduced from them. \* \* \* I conclude that when a negotiable promissory note, made payable to a particular person or order, is first indorsed by a third person, and then delivered to the payee, such indorser is *prima facie* an original promisor or guarantor, as the payee may elect, or the payee may, by indorsing his name above that of such third person, and transferring the note, make him a second indorser in the commercial sense, But the true nature of the transaction, and the understanding of the parties to it at the time, may be shown by parol proof, and such proof may destroy this right of election by the payee, and the third person backing such note may be held liable only as an original promisor, or as a guarantor, or as an indorser according to the nature of the transaction, and the original understanding of the parties to it. If it is shown by evidence that such third person signed his name on the back of such a note at the time it was made as security for the maker and for his accommodation, to give him credit with the payee, such proof does not alter the right of the payee to hold him bound as original promisor, or as guarantor, or as indorser, as he may elect, but strengthens his *prima facie* right to elect; such option may be exercised at any time by the payee, and so long as he holds the note, may be changed at his pleasure, even after the institution of a suit by him against such third person. If it be shown that the understanding between such third person and the payee at the time of the transaction was that such third person should be bound only collaterally, such understanding will destroy the right which the payee would have otherwise had, of electing to hold him bound as original promisor. These principles are fairly deducible from the only cases on the subject decided in Virginia or West Virginia. *Watson v. Hurt*, 6 Gratt. 633; *Orrick v. Colston*, 7 id. 198, and *Kearnes v. Montgomery*, 4 W. Va. 29. If a third person indorses at the time it is made a negotiable note not drawn payable to him, he thereby indicates that he intends to bind himself for the payment of the note in some form, and if he has failed to indicate in what form, it is fair to presume that he intended to be bound in any manner that the payee might elect. If he indicates to the payee at the time the manner in which he intends to be bound, though his purpose thus indicated be proven by parol, he cannot be held bound otherwise by the payee."

"It is true that in this case the note was not negotiable, and that in some of the States a distinction is drawn between the responsi-

bility to the payee aforesaid, by a stranger, who at the time a note is made puts his name on the back, where the note is negotiable, and where it is not. Such distinction is drawn in New York. It is held now in that State, that if the note is not negotiable, such an indorser of it is *prima facie* bound as an original promisor, but if the note is negotiable, he is *prima facie* bound only as an indorser. *Richards v. Warring*, 1 Keyes, 576; *Cromwell v. Hewitt*, 40 N. Y. 491. And *Phelps v. Vischer*, 50 N. Y. 69; 10 Am. Rep. 433. But this conclusion that there is such a distinction between negotiable paper and paper not negotiable was not taken in New York without serious opposition. It was finally settled in that State by the case of *Hall v. Newcomb*, 7 Hill, 416. This case was twice argued before the Court of Errors of that State. Upon the first argument the court was equally divided in opinion, and upon the second argument it was decided by a vote of 18 to 8. In Connecticut, as before stated, it is held that the indorsement of a note not negotiable at the time it is made by a third party *prima facie* renders him liable to the payee only as a guarantor, and in *Perkins v. Catlin*, 11 Conn. 213, the court expressly repudiates any distinction in that respect between a note not negotiable and one that is negotiable. Such a distinction in such a case is also repudiated by the Supreme Court of Missouri, though there, under such circumstances, the indorser is held *prima facie* liable to the payee in either case as an original promisor. *Lewis v. Harvey*, 18 Mo. 74. The same is the law in Massachusetts, where no distinction in such a case is made. *Sumner v. Gay*, 4 Pick. 311. The distinction was repudiated in *Champion & Lathrop v. Griffith*, 13 Ohio, 228, and also in *Rothschild v. Grix*, 31 Mich. 150; 18 Am. Rep. 171, where in such a case the indorser was held liable as an original promisor. The New York cases are reviewed in this last case, and the distinction drawn by them in such cases between negotiable notes and other notes is repudiated by the court. And generally speaking, no such distinctions have been made by the courts in these decisions, the cases having been generally decided without any regard to the fact that the notes were or were not negotiable. I conclude therefore that no such distinction can properly be drawn. But while an indorsement by a stranger, at the time a negotiable note is made, makes him *prima facie* responsible to the payee, either as principal promisor or as guarantor, as the payee may elect, yet 'if the note was intended for discount,' and

he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as second indorser in the commercial sense.' This is the language of Clifford, J., in delivering the opinion of the Supreme Court of the United States in 22 How. 350, and is a just conclusion from the authorities."

The editor of the American Reports says in a note on this case: "In a case like this the position of a stranger indorser was held in *Jones v. Goodwin*, 39 Cal. 493; 2 Am. Rep. 473, to be strictly that of indorser. (See *id.*, note, p. 473.) In *Ives v. Bosley*, 35 Md. 262; 6 Am. Rep. 411, that of joint maker. In *Eilbert v. Finkbeiner*, 68 Penn. St. 243; 8 Am. Rep. 176, that of second indorser, *prima facie*, but parol evidence was admitted to show that it was that of guarantor. In *Chaddock v. Vanness*, 35 N. J. L. 517; 10 Am. Rep. 256, that of second indorser or surety, and parol evidence was admitted to show which; but *per se* it implies no liability whatever. In *Chaffe v. Memphis, etc.*, R. R. Co., 64 Mo. 193, *prima facie* that of maker, and a *bona fide* purchaser is bound by an agreement between him and the payee, that he is to be liable only as indorser. In *Iser v. Cohen*, 1 Baxt. (Tenn.) 421, that of indorser *prima facie*, subject to enlargement by parol evidence. The same in *Best v. Hoppie*, 3 Colo. 137. In *Browning v. Merritt*, 61 Ind. 425, *prima facie* that of indorser, but subject to explanation."

"The differences of ruling on this subject in the different States are sufficiently pointed out in the principal case. The distinction between negotiable and non-negotiable paper seems peculiar to New York.

"The cases of *Moore v. Cross*, 19 N. Y. 227; *Bacon v. Burnham*, 37 N. Y. 616; *Meyer v. Hibsher*, 47 *id.* 265; *Phelps v. Vischer*, 50 *id.* 69; *Clothier v. Adriance*, 51 *id.* 322, have settled the law in New York that one, other than the maker, who indorses a negotiable promissory note before its delivery to the payee, is presumptively a second indorser, and is entitled to all the rights, privileges and exemptions incident to that situation; that *prima facie* he is not liable to the payee, whose name precedes his on the note, but only to subsequent indorsers; that an action upon such a note by payee against indorser may nevertheless be maintained, provided the former shows (which he may do by parol) that the apparent relative situation of the parties is not

the real one, and that the payee took the note from and gave credit or parted with value to the maker with the knowledge of the indorser and upon the faith of his indorsement. At first it was held that, as the payee is presumably liable to the indorser, he must, in order to recover of him and to avoid circuity of action, indorse the note without recourse, and could do so even at the trial, but since *Moore v. Cross*, *supra*, this requirement has been abandoned, and it is now held, that having the right to so indorse, it will be presumed to be done and treated as if done, and therefore in fact need not be done at all.

"The result of the various decisions seems to be as follows, viz.: That except in the *technical* sense of the words there is no such thing in New York as indorser or indorsement of non-negotiable paper; that the blank subscription of one's name upon or across such paper constitutes the subscriber presumptively a co-maker or joint promisor and surety of the maker, and he can be declared and recovered against as such; that a consideration is not presumed and must always be alleged and established; that proof of an intent to subscribe strictly as *indorser*, and to be liable only as such, is repugnant to the form of the contract, and will not be received; that subject to this rule the parties may severally show and claim the benefit of the exact agreement and understanding upon which the indorsement was made; that the holder of the note may overwrite the name of the blank indorser with such agreement or understanding, or with a contract of original promise or guaranty or suretyship, and may recover upon such overwritten contract; and finally, that the maxim *ut res magis valeat quam pereat* applies."

This doctrine has been held inapplicable to a guaranty of a note. Thus in *Allen v. Rundle*, 50 Conn. 9; S. C. 47 Am. Rep. 599, on the back of a promissory note the defendants executed a guaranty that it was "good and collectible until paid." Without having sued the maker of the note, who it was claimed was insolvent, the plaintiffs offered evidence that at the time of the making of the note it was understood between the maker, the guarantors and themselves, that it was made without consideration, for the accommodation of the guarantors, upon their promise to take care of it and pay it. *Held*, inadmissible. The court said: "We have not been able to find any case where a parol contemporaneous agreement was admitted for the purpose of showing waiver in an action upon a written guaranty like the one under consideration."



**Sec. 86. Orders.**

In case of an order, not negotiable, whose language is ambiguous, the attendant circumstances may be shown to determine the intention and understanding of the parties.<sup>1</sup>

A. & B., cultivating on shares the farm of C. & D., partners gave E., a creditor of A. & B., an order to C. & D. to pay a sum of money to E. and "take the same out of our share of the grain," referring to grain raised by A. & B. on the farm in question. C. & D. wrote "order accepted on the back of the instrument, and signed their firm name. *Held*, that the order was a valid bill of exchange, not payable out of a particular fund, nor conditional; and that C. & D. could not defend on the ground that before acceptance they had made advances to A. & B. on the faith of their share of the grain, to an amount larger than its value, as was known to E. at the time of acceptance.<sup>2</sup> Oral acceptance of an order is valid.<sup>3</sup>

**Sec. 87. Custom.**

Custom is provable as to the mode of giving notice of protest, in the absence of statutory regulation.<sup>4</sup>

So of days of grace.<sup>5</sup> Custom is not provable as to the effect of certification.<sup>6</sup> Nor to excuse regular protest by proof of a preliminary notice that the paper is about to mature.<sup>7</sup> Nor to impose the liability of indorser on one, who without indorsing them, transfers notes of third persons in payment for goods.<sup>8</sup>

**Sec. 88. Collateral mortgage in hands of a bona fide purchaser.**

Parol evidence is incompetent to subject a chattel mortgage, executed as security for the payment of a promissory note, to prior equities in the hands of a *bona fide* purchaser of the note and assignee of the mortgage.

<sup>1</sup> Brill v. Tuttle, 81 N. Y. 454; S. C. 37 Am. Rep. 515.

<sup>2</sup> Corbett v. Clark, 45 Wis. 403; S. C. 30 Am. Rep. 763.

<sup>3</sup> Jarvis v. Wilson, 46 Conn. 90; S. C. 33 Am. Rep. 18.

<sup>4</sup> Gindrat v. Mechanics' Bank, 7 Ala. 324. Chicopee Bank v. Eager, 9 Metc. 583.

<sup>5</sup> Mills v. Bank, 11 Wheat. 431.

<sup>6</sup> Security Bank v. Nat. Bank, 67 N. Y. 458; S. C. 23 Am. Rep. 129.

<sup>7</sup> Moore v. Waitt, 13 N. H. 415.

Farmers' Bank v. Duvall, 7 G. & J. 78. Barnes v. Vaughan, 6 R. I. 259.

*Contra*: Grand Bank v. Blanchard, 23 Pick. 305.

Marine Bank v. Smith, 18 Me. 99.

<sup>8</sup> Paine v. Smith, 33 Minn. 495.

This doctrine is very well explained in *Myers v. Hazzard*, 50 Fed. Rep. 155, by McCrary, J. He says: "We are confronted in the outset by a conflict of authority upon the principal question. In several of the states it is held that the assignee of a negotiable note, secured by mortgage, takes the latter, as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. The argument in support of this doctrine is that a mortgage is in its nature a non-negotiable instrument, and that the rights of the parties to it cannot be fixed and determined by the law merchant. Mortgages, it is insisted, are not commercial paper, and it is not convenient to pass them from hand to hand, so that they may perform the office of money in commercial transactions, as may be none with notes, bills, and the like. It is accordingly held, in the cases now under consideration, that while the purchaser of a note secured by mortgage may be entitled to all the rights of an innocent purchaser of commercial paper, so far as the note is concerned, yet, if he seeks to foreclose the mortgage, he may be met by any defense which would have been good as against the original mortgagee. *Johnson v. Carpenter*, 7 Minn. 176; *Hos-tetter v. Alexander*, 22 Minn. 559; *Olds v. Cummings*, 31 Ill. 188; *White v. Sutherland*, 64 Ill. 181; *Fortier v. Darst*, 31 Ill. 212; *Sumner v. Waugh*, 56 Ill. 531; *Baily v. Smith*, 14 Ohio St. 396. On the other hand, it is held by the Supreme Court of the United States, and by the courts of last resort in a large majority of the states, that an assignee for value of a negotiable note secured by a mortgage, before due and without notice, takes the mortgage, as he does the note, free from equities existing between the original parties. It is said, in support of this doctrine, that the note, being the principal thing, imparts its character to the mortgage. The mortgage is regarded as following the note, and as taking to itself the same qualities, so that the assignee takes the former, as he takes the latter, free from any existing equities between the original parties. A leading case upon this subject, and a controlling one, so far as the federal courts are concerned, is that of *Carpenter v. Longan*, 16 Wall. 271. In that case the rule just stated was laid down by Mr. Justice Swaine as follows:

"The assignment of a note underdue raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was non-

negotiable, or had been assigned after maturity. The question presented for our determination is whether an assignee, under the circumstances of this case, takes the mortgage, as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against such a holder, would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who "puts trust and confidence in the deceiver should be a loser, rather than a stranger."

"In order to understand the scope of this opinion, it is necessary to note that the defense in the case as against the mortgage was, in substance, that as between the original parties, it had been satisfied. The mortgagor alleged that at the time of the execution of the mortgage she delivered to the mortgagee certain property, which he agreed to sell, and apply the proceeds to the satisfaction of the note, and that, instead of so doing, he converted the property so delivered to his own use. The sole question was whether the equitable satisfaction of the mortgage in this way could be set up as against the assignee. This case is not therefore as some lawyers have assumed, authority for the doctrine that the *bona fide* purchaser, without notice, of a negotiable underdue note, secured by mortgage, holds the mortgage precisely as he holds the note, subject to no defenses whatever that would not be good against the latter. In that case there was no question as to the title of the mortgagor at the time that the mortgage was given, nor as to the rights of any third party with respect to the mortgaged property, nor as to the validity or construction of the mortgage itself. It seems manifest that it was not the intention of the court to assert broadly the rule that, because a mortgage is given to secure a negotiable note, which before maturity is assigned to a *bona fide* purchaser, therefore no objection can be raised to the mortgage, unless it would be an objection constituting a defense to the note in the hands

of such a purchaser. The court decided the case before it, and was careful to qualify its opinion by the words, 'under the circumstances of this case.' The general rule announced in *Carpenter v. Longan* has been adopted in Massachusetts, Maine, Michigan, Wisconsin, Nebraska, Iowa, Missouri, and other states. See *Jones Mortg.* § 834, and numerous cases cited. But the doctrine has not yet been established as the law of New York or Pennsylvania. *Union College v. Wheeler*, 61 N. Y. 88; *Horstman v. Gerker*, 49 Pa. St. 282.

"In many of the cases the rule is stated to be that the mortgage is regarded as following the note, and as taking the same character; but it must, of course, be understood that the mortgage takes the character of a negotiable note only in so far as in its nature it is capable of having that character imputed to it, and therefore, the rule must be subject to certain modifications or exceptions. In any suit brought by the assignee of the note to foreclose the mortgage, the mortgagor may be heard to assert that the mortgage is invalid as to all or part of the property, by reason of anything that appears upon the face of the mortgage, or by reason of anything that the assignee is bound by law to know, whether the same constitutes a defense to the note or not. A third party may be heard to assert, as against the validity of such a mortgage in the hands of the assignee, that the mortgagor, at the time of the execution of the mortgage, had no power to execute it. The mortgage in the hands of the assignee, like the note, is freed from equities existing as between the original parties. This being so, no defense to the mortgage, on the ground of fraud, duress, or want of consideration, could be admitted as against the assignee; nor could the defense of payment or satisfaction, nor of a release of the mortgage, as between the original parties, nor of any other similar matter, be set up. But there may, beyond question, be defenses to a mortgage in such a case that cannot be defenses to the note,—defenses the force and effect of which cannot be determined by an appeal to the principles of the law merchant. Of this character are objections which relate to, and in the nature of the case can only relate to, the mortgage, its construction, validity, or force and effect. They may be objections which third parties only are interested in raising. We cannot give to the mortgage all the properties of negotiable paper, nor apply to it all the principles of the law merchant, without a disregard of elementary principles."

## CHAPTER XVI.

## DEEDS.

- SEC. 89. Delivery.  
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**Sec. 89. Delivery.**

Parol evidence is admissible to show that a deed was never delivered, or was delivered upon an unfulfilled condition, or in escrow.

Stephen says (Ev., art. 90), that parol evidence is admissible to prove "the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any contract, grant or disposition of property." The court in *Kidner v. Keith*, 109 E. C. L. 34, announced the well-established rule: There is no doubt in point of law that where by express declaration, or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should have happened, the deed is not a complete and perfect deed until that event has happened."<sup>1</sup>

<sup>1</sup> Approved in *Dietz v. Farish*, 79 N. Y. 520.

The same principle is declared in :  
*Leppoc v. Nat. Union Bank*, 32 Md. 136.  
*Harkreader v. Clayton*, 56 Miss. 383;  
 S. C. 31 Am. Rep. 369.

*Chipman v. Tucker*, 38 Wis. 43; S. C. 20 Am. Rep. 1.

*Tisher v. Beckwith*, 30 Wis. 55; S. C. 11 Am. Rep. 546.

*Hawkes v. Pike*, 105 Mass. 560.  
*Elmore v. Marks*, 39 Vt. 538.

*Delivery to grantee in escrow:* A completed deed may not however be delivered to the grantee in escrow, to take effect upon the performance of some collateral act.<sup>1</sup> So in *Hargrave v. Melbourne*, 86 Ala. 270, it was held in respect to a deed, perfectly executed on its face, but delivered to the grantee on condition that the grantor's wife should afterwards execute it. The subject was learnedly examined in *Miller v. Fletcher*, 27 Gratt. 403; S. C. 21 Am. Rep. 356, which was the case of a bond, perfect on its face, but delivered to the obligee on condition that others sign it. The case of a bond is distinguishable from that of a deed, but the following language is instructive: "In *Hicks v. Goode*, 12 Leigh, 479, 490, Judge Cabell, in delivering the opinion of the court, conceded the distinction between a deed delivered as an escrow to the party to the deed, and one that is delivered to a stranger, and he was not disposed to controvert it. He said: 'The reasoning on which the distinction is founded was not only technical, but unsatisfactory, to his mind. He considered it as settled however that if a deed be delivered to the party himself, to whom it is made as an escrow, but to become the deed of him who sealed it on certain conditions, in such case, whatever be the form of the words, the delivery is absolute, and the party is not bound to perform the conditions.'

"The counsel who argued that case, on both sides, admitted that such is the law; too well settled for controversy. It was insisted however on behalf of the defendant, that the rule applied only to a deed perfect and complete on its face, requiring nothing to be done to give it full efficacy as a deed, according to the intention, but the mere delivery. But where the instrument at the time it passed into the hands of a grantee or obligee is incomplete, and indicates clearly on its face that some other act is to be done to give it effect, according to the intention of all the parties, there it was insisted the rule did not apply, and it was competent to show by parol that the delivery was upon a condition which had not been performed. And so this court held, and it will be seen upon examination that the decision was placed upon that ground exclusively.

"In *Ward v. Churn*, 18 Gratt. 801, Judge Jaynes adverted to this rule of the common law: 'He said it was strict and technical to the last degree; and yet he did not venture to deny that

<sup>1</sup> *Worrall v. Munn*, 5 N. Y. 228; S. C. 55 Am. Dec. 330.

*Cocks v. Barker*, 49 N. Y. 107.

the doctrine is well settled.' In the course of his opinion he cites with approbation some observations of Chief Justice Best in the case of *Hudson v. Revett*, 15 Eng. C. L. 467, wherein the learned chief justice quotes Comyn, vol. 4, p. 276, *Fait*, A. 4 as saying: 'If the deed be delivered to *the party* as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition be performed, though the party happens to have it before the condition is performed.'

"Now it is most remarkable, be it said with all humility, that two judges, so distinguished for accuracy and learning, should have fallen into such an error. What Comyn does say is this: 'So if it (the deed) be delivered to a *stranger* as an escrow, to be his deed upon performance of conditions, it is not his deed until the conditions are performed, though the party happens to have it before. 2 Rol. 25, l. 25, 45; Coke Litt. 36 *a*.' 'Or be delivered to a stranger to keep till conditions be performed.' 2 Rol. 25, l. 40. 'Or *to be* delivered to the party as his deed upon performance of a condition.'

"Now this is relied upon by Chief Justice Best as authority for the position, that a deed may be delivered to the party upon condition, and it is good. But it will be perceived that Comyn means simply to affirm, that if the deed be delivered to a *stranger*, 'to be delivered to the party as his deed upon performance of a condition, it is not his deed till the conditions be performed, though the party happens to have it before.' That such was his meaning is manifest from the very next sentence, not noticed by the learned chief justice, in which he declares: 'But a delivery can not be to the obligee as an escrow.' 2 Cro. 85, 86.

"And in Division A. 3, p. 274, Comyn again declares, that 'if an obligation be made to A., and delivered to A. himself as an escrow, to be his deed upon performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant.

"A more remarkable instance of an entire misconception of an author's meaning has rarely been exhibited by a learned judge. It is worthy of observation that Chief Justice Best himself does not assert the rule laid down by Sheppard is not sound law; he merely declares it a technical subtlety. The case of *Hudson v. Revett* was decided upon the ground that the deed was incomplete when it passed into the hands of the grantee; and the

observations of the chief justice were wholly unnecessary to the decision."

"There is one other case decided by an English court, sometimes relied on as opposing the doctrine of the text in Sheppard and the other common-law writers. I mean the case of *Johnson v. Baker*, 4 Barn & Ald. 440, in which it was held it might be shown by parol that a composition deed was delivered as an escrow upon condition it should be void unless executed by certain other creditors, which was not done. It will be seen however that the instrument was a deed of composition, whereby payments were to be made to all the creditors, each of whom was to release his claim, and if any should refuse, the entire purpose of the deed was defeated. Nor does it appear that the creditor to whom the delivery was made, was then a party to the deed, and he was therefore in no condition to insist upon the estoppel.

"With the exception of these cases, which indeed do not expressly controvert the principle, the English authorities, so far as I have seen, are uniform in their adherence to the doctrine for which I am contending. In the United States the cases speak almost with one voice. This is the more remarkable because in a large majority of the States, a strong disposition has been constantly manifested either by judicial decision or by legislation, to rid the courts of those rules of the common law which are regarded as purely technical. The rule in question has however been adhered to with a unanimity almost without parallel. It is impossible, with any just regard to the proper limits of an opinion, to quote from the numerous authorities upon this subject. It may not be improper, in a question of so much importance, never yet settled in this State, to cite the opinions of distinguished judges in some few of the cases decided in the different States, and also the opinions of learned commentators who have written upon the subject." Citing *Simonton's Estate*, 4 Watts, 180; *Duncan v. Pope*, 47 Ga. 445; *Cin., Wil. & Zanesville R. Co. v. Iliff*, 13 Ohio St. 235; *Ward v. Lewis*, 4 Pick. 518; *Currie v. Donald*, 2 Wash. (Va.) 59; 2 Lomax Dig. 38; 3 Wash. Real Prop. 268. "To these authorities may be added the cases of *Brackett v. Barney*, 28 N. Y. 333; *Worrall v. Munn*, 5 id. 238; *Jackson v. Catlin*, 2 Johns. 259, decided by the Supreme Court of New York. The case of *Black v. Shreve*, 13 N. J. Eq. 456; the case of *Herdman v. Bratten* 2 Harr. (Del.) 396; the case of *Mad. & Ind. Plank R. Co. v. Stevens*, 10 Ind. 1; the case of *Brown v. Reynolds*, 5 Sneed



(Tenn.) 639; *Gibson v. Partee*, 2 Dev. & Battle (N. C.) 530; *Hagood v. Harley*, 8 Rich. Law, 325; *Graves v. Tucker*, 10 S. & M. (Miss.) 9; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, 161; and the case of *Moss v. Riddle*, decided by the Supreme Court of the United States. 5 Cranch, 351.

"A doctrine sustained by such an array of authorities, a doctrine which has survived all the changes and innovations of modern reform, must have something to commend it to the approbation of the courts beyond its mere antiquity. It is not to be overturned by denunciation. The chief argument against it is, that it recognizes distinctions technical and unsatisfactory in the extreme. It is said, for example, a deed may be delivered as an escrow to a stranger, or even to a co-obligator, to be delivered by them to the obligee; and there can be no good reason why it should not be delivered directly to the obligee as an escrow. It would be easy to show that this distinction is not so technical and unsatisfactory as is imagined. But it does not concern me to vindicate that distinction, I am dealing only with the particular rule of the common law invoked in this case. The question is, whether this court can safely depart from it here. Whether it can overturn that which is so well established elsewhere, and so fully sustained by the concurring voices of able commentators and great judges."

Mr. Jones, conceding this to be the old rule, says (Const. Cont. § 163), that "this rule cannot be successfully defended," and "the best authorities do not sustain the proposition that a deed cannot be put into the possession of the grantee upon condition, and such a rule could not be enforced unless courts were prepared to yield the principle that the real intention of the parties must govern the interpretation of their acts." It is indeed difficult to distinguish between the conditional delivery of an unsealed instrument and of a sealed instrument, and to ascribe any reason for the admission of oral evidence in the former case which would be equally applicable in the latter. But so far as adjudications go they seem to sustain the old rule. In *Ford v. James*, 4 Keyes, 300, however, where a deed was delivered to the grantee, he paying part of the purchase price, but declaring that he would not then agree to accept it, and promising to pay the balance or return the deed in a few days, receiving back the money paid, this was held no delivery. The court observed: "Taking the evidence of Spencer alone, it clearly appears that he never made

any delivery of the deed, conditional or otherwise. He did not deliver it to James as and for the deed of the grantors, but merely left it with him as a depositary until he should determine whether or not he would take the land. This constitutes no legal delivery. A deed may be deposited with the grantee or handed to him for any purpose other than as the deed of the grantor, or as an effective instrument between the parties, without becoming operative as a deed."

So in *Blewett v. Cable Ry. Co.'s*, 51 Fed. Rep. 628, it was held that parol evidence was inadmissible to show that a deed, delivered to and purporting to vest title unconditionally in an assignee of railroad companies, as part of a bonus to aid the construction, was not to take effect if the road was not built on account of failure to secure additional bonus.

*Delivery to attorney:* Delivery to the attorney, as such, is equivalent to a delivery to the grantee himself; and it is not competent for the grantor, or those claiming under him by a subsequent conveyance, to show by oral evidence that a condition was annexed to the delivery, for the non-performance of which the deed never became operative.<sup>1</sup>

*Delivery to grantee for delivery to third person in escrow:* Whether delivery of a deed to the grantee, to be by him delivered to a third person in escrow, is not an absolute delivery to the grantee, is a question not conclusively decided. In *Braman v. Bingham*, 26 N. Y. 483, it is intimated that the delivery is not conclusive. *Selden, J.*, said:

"A fatal objection to the third division of the answer, as a defense, is that it shows that the deed was delivered to the grantee, to be held by him in escrow. It is well settled that such a delivery vests the title in the grantee, although it may be contrary to the intention of the parties. *Lawton v. Sager*, 11 Barb. 349; *Worrall v. Munn*, 5 N. Y. 229; *Gilbert v. N. A. Fire Ins. Co.*, 23 Wend. 45. The offer of evidence in support of this division of the answer embraced the additional fact, not alluded to in the answer, that the deed was handed to the plaintiff to be delivered to and safely kept by one of the clerks in the register's office. Whether these facts, not pleaded, if material, were admissible in evidence may admit of some doubt, but I do not deem it necessary to decide that question. If the answer, in addition to

<sup>1</sup> *Hubbard v. Greeley*, — Me. —; 24 Atl. Rep. 799.

what it contains, had embraced those facts, it would not, in my opinion, have presented a defense. It has been held in one case that a deed may be delivered to the grantee for the purpose of transmission to a third person, to be held by him in escrow until the happening of some event when it should take effect as a conveyance, and that such delivery would not be absolute. *Gilbert v. Fire Ins. Co.*, 23 Wend. 43. In that case the grantee had deposited the deed with the third person in pursuance of the arrangement, the condition had not been performed, and the grantee made no claim under the deed. The case presented merely the question, whether the grantor still retained an insurable interest in the premises described in the deed, the nominal grantee testifying to the terms in which the deed was delivered to him. Limited to its peculiar circumstances, no fault can be found with the decision; but if the grantee had retained the deed, claiming that its delivery to him was absolute, and in a contest between him and the grantor, parol proof of a conditional delivery had been offered, I think the result would have been different. If I am wrong in this conclusion, the case discloses an avenue for the overthrow of titles, by parol proof, which was supposed to be closed by the rule to which it would seem to form an exception. The reason given for the rule excluding parol evidence of a conditional delivery to the grantee applies to all cases where the delivery is designed to give effect to the deed, in any event, without the further act of the grantor. 'When the words are contrary to the act, which is the delivery, the words are of none effect.' *Co. Litt.* 36 a. 'Because then a bare averment, without any writing, would make void every deed. *Cro. Eliz.* 884. 'If I seal my deed and deliver it to the party himself, to whom it is made, as an *escrow* upon certain conditions, etc., in this case, *let the form of the words be what it will*, the delivery is absolute, and the deed shall take effect as his deed presently.' *Shep. Touch.* 59; *Whyddon's case*, *Cro. Eliz.* 520; *Cruise's Dig. Title*, 33, *Deeds*, ch. 2, '80. If a delivery to the grantee may be made subject to one parol condition, I see no ground of principle which can exclude any parol condition. The deed having been delivered to the grantee, I think the parol evidence that the delivery was conditional was properly excluded.

"But there is also another ground on which the evidence was properly excluded. 'It is essential to an *escrow* that it be delivered to a third person, to be by him delivered to the obligee or

*grantee*, upon the happening of some event, or the performance of some condition, from which time it becomes absolute.' James v. Vanderheyden, 1 Paige, 385. By the agreement, as offered to be proved, the deed of Bingham to Brayman was to be held as an escrow until Braman's return, 'and then to be given to *Bingham*.' A deed thus delivered is not an escrow, although the parties may call it such, because there is no event in which it is to be delivered to the grantee. A deed so delivered, if not so intended, when deposited, to operate as a deed *in presenti*, could never have any validity, without a new agreement of the parties. James v. Vanderheyden, *supra*.

"If there were nothing in the case to aid in ascertaining the intention of the parties in making the delivery, beyond the parol proof which was offered, the deed would be held absolute on account of its delivery to the grantee, or it would be held void for want of any delivery; it could not be treated as an escrow."

*Completeness essential to absolute delivery:* But to have the effect of an absolute delivery, the deed must be manifestly and intentionally complete, and the condition of delivery must be purely collateral. Thus in Brackett v. Barney, 28 N. Y. 333, it was held that a mortgage handed by grantor to grantee to be afterwards executed by the grantor's wife, and drawn in form for her execution, is not conclusively delivered in law. Selden, J., said: "The delivery of a deed without acceptance, is nugatory (Crosby v. Hillyer, 24 Wend. 284), and the mere taking of an instrument into his hands by the grantee and retaining it of itself amounts to nothing, where the circumstances show that he did not receive it or hold it as an effective conveyance. The question of delivery, involving acceptance, is always one of intention, depending on the circumstances of the transaction. Bell v. Lord Ingestre, 12 Q. B. 317; Chouteau v. Suydam, 21 N. Y. 179. In some cases the intention is clear, in others it is doubtful; but the intention always determines the character of the act. An intention to deliver on the one hand and to accept on the other, is necessary to give effect to the instrument. The delivery of a deed by the grantor to the grantee, to be held as an escrow, and to become effectual on the performance of some collateral act, is held to operate as an absolute delivery immediately. But the rule is applicable only when the deed is intended ultimately to take effect as a conveyance *from the force of such delivery*, without further act on the

part of the grantor. But a deed may be delivered to the grantee to await his determination whether he will accept it or not (*Gilbert v. N. Am. F. Ins. Co.*, 23 Wend. 43; *S. C.* 35 Am. Dec. 543), or to be examined and returned if found defective (*Graves v. Dudley*, 20 N. Y. 79), and as in the present case, to await complete execution by other parties (*Chouteau v. Suydam*, *supra*), without the conclusive inference in any of the cases that such delivery gives effect to the instruments. In every such case, when an absolute delivery was not intended, the grantee would be a mere trustee of the instrument for the grantor." The same was held in *Wendlinger v. Smith*, 75 Va. 309. See also *Chouteau v. Suydam*, 28 N. Y. 179.

So in *Harkreader v. Clayton*, 56 Miss. 383; *S. C.* 31 Am. Rep. 369, it is said: "The grantor must consent that the deed shall pass irrevocably from his control, and the grantee must accept it.

This reasoning would cover the case of a deed perfect upon its face, but delivered to the grantee on condition that the grantor's wife was to join, but if it goes so far it must be *obiter*, for the deed was manifestly incompletely executed.

*Time of delivery*: The time of the delivery of a deed or mortgage may be shown by parol, without regard to the date.<sup>1</sup>

## Sec. 90. Capacity.

Parol evidence is admissible to impeach a deed, directly or collaterally, by showing lack of capacity in the grantor; as in case of infancy, insanity, coverture, drunkenness, etc.<sup>2</sup>

<sup>1</sup> *Moody v. Hamilton*, 22 Fla. 298

*Bruce v. Slemph*, 82 Va. 352.

<sup>2</sup> *Riggan v. Green*, 80 N. C. 236; *S. C.* 30 Am. Rep. 77.

*Farley v. Parker*, 6 Oreg. 105; *S. C.* 25 Am. Rep. 504.

*Eaton v. Eaton*, 37 N. J. L. 108; *S. C.* 18 Am. Rep. 716.

*Dexter v. Hall*, 15 Wall, 20.

*Van Deusen v. Sweet*, 51 N. Y. 383.

*Chancellor v. Donnell*, — Ala. —; 10 So. Rep. 910.

*Miller v. Finley*, 26 Mich. 249; *S. C.* 12 Am. Rep. 306.

*Young v. Stevens*, 48 N. H. 133; *S. C.* 2 Am. Rep. 202.

*Woodcock v. Johnson*, 36 Minn. 217.

*Paine v. Aldrich*, 133 N. Y. 544.

*Jackson v. King*, 4 Cow. 207; *S. C.* 15 Am. Dec. 354.

*Ownigs' case*, 1 Bland Ch. 370; *S. C.* 17 Am. Dec. 311.

*Sutton v. Reagan*, 5 Blackf. 217; *S. C.* 33 Am. Dec. 466.

*Bensell v. Chancellor*, 5 Whart. 371; *S. C.* 34 Am. Dec. 561.

*Wall v. Hill's heirs*, 1 B. Monr. 290; *S. C.* 36 Am. Dec. 578.

*Rogers v. Walker*, 6 Pa. St. 371; *S. C.* 47 Am. Dec. 470.

*Allis v. Billings*, 6 Metc. 415; *S. C.* 39 Am. Dec. 744.

*Harbison v. Lemon*, 3 Blackf. 51; *S. C.* 23 Am. Dec. 376.

*Matter of Desilver*, 5 Rawle, 111; *S. C.* 28 Am. Dec. 645.

In *Van Deusen v. Sweet*, 51 N. Y. 378, the Commission of Appeals held that a deed executed by one *non compos mentis*—which the court in that case defined to mean “totally and positively incompetent”—is absolutely void; and that where a defendant in an action to recover the possession of real property claims under such a deed, the fact of the incapacity of the grantor may be shown by plaintiff to defeat such claim, although no fraud is alleged and such incapacity had not been legally or judicially determined at the time of or prior to the execution of the deed.

In *Harbison v. Lemon*, 3 Blackf. 51; S. C. 23 Am. Dec. 376, Blackford, J., said: “The doctrine in England for a long time was that a man should not be permitted to stultify himself. 60 Lit. 247. It was not however originally the law of that country, as is shown in Fitzherbert’s *Natura Brevium*, 202. Nor is it believed to be the law either there or here at the present time.”

### Sec. 91. Consideration—unexpressed.

An unexpressed consideration may be shown by parol.<sup>1</sup>

### Sec. 92. Consideration—expressed—how far subject to inquiry.

Parol evidence is competent to contradict the recital of receipt of the consideration, or to show an additional or different consideration, but not to contradict the deed as to price or quantity.<sup>2</sup>

<sup>1</sup> *Hartley’ Lessee v. McAnulty*, 4 Yeates, 95; S. C. 2 Am. Dec. 396.

*McClanahan v. Henderson*, 2 A. K. Marsh. 388; S. C. 12 Am. Dec. 412.

*Nedvidek v. Meyer*, 46 Mo. 600.

*Hannan v. Oxley*, 23 Wis. 519.

<sup>2</sup> *O’Neale v. Lodge*, 3 Harris & McHenry, 433; S. C. 1 Am. Dec. 377.

*Elysville Manf. Co. v. Okisko Co.* 1 Md. Ch. 392.

*Collins v. Tillou*, 26 Conn. 368.

*Linsley v. Lovely*, 26 Vt. 123.

*McCrea v. Purmort*, 16 Wend, 460; S. C. 30 Am. Dec. 103.

*Witbeck v. Waine*, 16 N. Y. 538.

*McKinster v. Babcock*, 26 N. Y. 380

*Barker v. Bradley*, 42 N. Y. 320.

*Wilkinson v. Scott*, 17 Mass. 249.

*Goodspeed v. Fuller*, 46 Me. 141; S. C. 71 Am. Dec. 572.

*Harrison v. Castner*, 11 Ohio St. 339.

*Jones v. Jones*, 12 Ind. 389.

*Holbrook v. Holbrook*, 30 Vt. 432.

*Swafford v. Whipple*, 3 Iowa, 261; S. C. 54 Am. Dec. 498.

*Bolles v. Beach*, 22 N. J. L. 680.

*Hamilton v. M’Guire*, 3 S. & R. 355.

*Pritchard v. Brown*, 4 N. H. 400.

*Bowen v. Bell*, 20 Johns, 338; S. C. 11 Am. Dec. 286.

*Watson v. Blaine*, 12 S. & R. 131; S. C. 14 Am. Dec. 669.

*Harvey v. Alexander*, 1 Rand. 219; S. C. 10 Am. Dec. 519.

*Tyler v. Carlton*, 7 Greenl. 175; S. C. 20 Am. Dec. 357.

This doctrine is put by Mr. Smith (Lead. Cas. 723), on the ground that "the deed is not the contract; and that its object is to transfer the title to the purchaser, and not to state the terms on which he bought." The later New York cases reverse the doctrine of *Schermehorn v. Vanderheyden*, 1 Johns. 139; S. C. 3 Am. Dec. 304; which was declared with very little expressed consideration. The early New York doctrine was also laid down in *Betts v. Union Bank of Maryland*, 1 Harr. & G. 175; S. C. 18 Am. Dec. 283; *Graves v. Carter*, 2 Hawks, 576; S. C. 11 Am. Dec. 786; *Harrison v. Laverty*, 8 Mart. 213; S. C. 13 Am. Dec. 283; *Clarkson v. Hanway*, 2 P. Wms. 203; *McCampbell v. Durst*, 73 Tex. 410.

Parol evidence that a deed purporting to be for a consideration was without consideration is inadmissible as between the parties.<sup>1</sup> Non-payment of a nominal consideration may not be shown to defeat a deed.<sup>2</sup> It is well settled that the consideration clause is open for explanation for any purpose except to defeat the conveyance.<sup>3</sup> The only effect of the statement of consideration and its payment is to estop the grantor from denying any consideration, and to prevent a resulting trust in him.<sup>4</sup>

*Peck v. Vandenberg*, 30 Cal. 23.

*Oliver v. Oliver*, 4 Rawle, 141; S. C. 26 Am. Dec. 123.

*Beach v. Packard*, 10 Vt. 96; S. C. 33 Am. Dec. 185.

*Depeyster v. Gould*, 2 Green Ch. 474; S. C. 29 Am. Dec. 723.

*Groves v. Steel*, 2 L. Ann. 480; S. C. 46 Am. Dec. 551.

*Rockhill v. Spraggs*, 9 Ind. 30; S. C. 68 Am. Dec. 607.

*Collins v. Tillou's Adm'r*, 26 Conn. 368; S. C. 68 Am. Dec. 398.

*Buckley's Appeal*, 48 Pa. St. 491; S. C. 88 Am. Dec. 468.

*Sullivan v. Lear*, 23 Fla. 463; S. C. 11 Am. St. Rep. 388.

*Booth v. Hynes*, 54 Ill. 363.

*Howell v. Moores*, 127 Ill. 67.

*Parker v. Foy*, 43 Miss. 260; S. C. 55 Am. Rep. 484.

*Adams v. Lambard*, 80 Cal. 426.

*Murdock v. Cox*, 118 Ind. 266.

*Scoggin v. Schloath*, 15 Oreg. 380.

*Wood v. Moriarity*, 15 R. I. 518.

*Kickland v. Menasha Co.* 68 Wis. 34.

*Wheeler v. Billings*, 38 N. Y. 263.

*McConnell v. Brayner*, 63 Mo. 461.

*Bolles v. Beach*, 22 N. J. L. 680.

*Schillinger v. McCann*, 6 Greenl. 364.

*Hebbard v. Haughian*, 70 N. Y. 54.

*Baldwin v. Dow*, 130 Mass. 416.

*Holmes' Appeal*, 79 Pa. St. 279.

*Burnham v. Dorr*, 72 Me. 198.

*Fall v. Glover*, — Neb. —; 52 N. W. Rep. 168.

*Union M. L. Ins. Co. v. Kirchoff*, 133 Ill. 368; 27 N. E. Rep. 91.

<sup>1</sup> *Gardner v. Lightfoot*, 71 Iowa, 577.

*Feeney v. Howard*, 79 Cal. 525.

*Salisbury v. Clarke*, 61 Vt. 453.

*Hammond v. Woodman*, 41 Me. 177; S. C. 66 Am. Dec. 219.

<sup>2</sup> *Meriam v. Harsen*, 2 Barb. Ch. 267.

*Draper v. Shoot*, 25 Mo. 197; S. C. 69 Am. Dec. 462.

<sup>3</sup> *Murdock v. Gilchrist*, 52 N. Y. 247.

<sup>4</sup> *Hebbard v. Haughian*, 70 N. Y. 54. *Goodspeed v. Fuller*, 46 Me. 141.

Chief Justice Appleton has said on this point: "It may be shown that the price of the land was less than the consideration expressed in the deed, as in *Bowen v. Bell*, 20 Johns. 338; or that it was more, as in *Belden v. Seymour*, 8 Conn. 304; or that it was contingent, dependent upon the price the grantee may obtain upon a resale of the land, as in *Hall v. Hall*, 8 N. H. 129; or that it was in iron when the deed expressed a money-consideration, as in *McCrea v. Purmort*, 16 Wend. 460; or that no money was paid, but that it was an advancement, as in *Meeker v. Meeker*, 16 Conn. 387; or that a portion of the price was to be paid by the grantee and the balance was an advancement, as in *Hayden v. Mentzer*, 10 S. & R. 329; or that it was paid by some one other than the grantee, and thus raise a resulting trust, as in *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397; *Dudley v. Bosworth*, 10 Humph. 9." "The entire weight of authority tends to show that the acknowledgment of payment in a deed is open to unlimited explanation in every direction."<sup>1</sup>

*Illustrations:* 1. In *Louisville, etc. Ry. Co. v. Neafus*, — Ky, —, 18 S. W. Rep. 1030, it was held that though the expressed consideration of a deed to a railroad company is "benefit to be derived from the building of the road and one dollar paid," the grantor may, by parol evidence, show that the real consideration was the company's promise to build a depot on the land; the court observing, "there is no rule better settled by this court than the one allowing a party to show, by parol evidence, a consideration in addition to or different from that expressed on the face of a deed or other written memorial of the contract." So in *Hall v. Solomon*, 61 Conn. 476; 23 Atl. Rep. 876, it was held that in an action by the grantors of property to restrain the grantee from using it for the sale of intoxicating liquors, evidence is admissible of a parol agreement that part of the consideration for the grant was that the property should not be used for such purposes. The court observed: "It will be remembered that it is not the office of a deed to express the terms of the contract of sale, but to pass the title pursuant to the contract. Therefore a parol agreement, being a part of the consideration for the sale, restricting the use of the premises in one particular for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and

<sup>1</sup> *Goodspeed v. Fuller*, 46 Me. 141.



the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written instrument. *Collins v. Tillou*, 26 Conn. 368; *Pierce v. Woodward*, 6 Pick. 206; *Willis v. Hulbert*, 117 Mass. 151; *Tallmadge v. Bank*, 26 N. Y. 105."

2. In *Fechheimer v. Fronstine*, 15 Colo. 386, the court said: "As a general rule, the consideration recited in an instrument under seal, as well as in a simple receipt, is *prima facie* evidence only, and may be controlled or rebutted by parol proof. It is now firmly established that such recitals stand upon a distinct basis, and are merely *prima facie* evidence against the party making them. They are like ordinary receipts which are open to explanation by parol. This question has been frequently before the courts, and the rule in favor of the admissibility of such evidence is now well settled. That this is true of ordinary receipts for money, there can be no doubt. This is said by Dr. Wharton to be 'a necessary consequence of the informality of such instruments.' 2 Whart. Ev., § 1064. The same rule has been applied in many cases to the consideration clause in a deed under seal. See *Wilkinson v. Scott*, 17 Mass. 249; *Clapp v. Tirrell*, 20 Pick. 247; *Thayer v. Viles*, 23 Vt. 494; *White v. Miller*, 22 id. 380; *Belden v. Seymour*, 8 Conn. 304; *Bowen v. Bell*, 20 Johns. 338; *Bassett v. Bassett*, 55 Me. 127. In *Wilkinson v. Scott*, *supra*, it was held that a receipt was always open to explanation, and the fact that it was under seal did not change the rule; and although a grantor was estopped by his deed to deny that he granted or that he had a good title to the estate conveyed, yet he was not bound by the consideration expressed; but that the real consideration might be proven. In *Clapp v. Tirrell*, *supra*, it was held that the consideration expressed was only *prima facie* evidence of payment, and that it might be controlled and rebutted by proof. And in *Thayer v. Viles*, *supra*, it was held that the recitals in a deed of the amount of the consideration and its receipt will not estop a party from sustaining an action for the price. In *White v. Miller*, *supra*, it was decided that such recitals were subject to explanation. In *Belden v. Seymour*, *supra*, it was said: 'The only operation of a clause in a deed regarding the consideration is to prevent a resulting trust in the grantor, and to estop him forever to deny the deed for the uses therein mentioned.' We deem further reference to authorities unnecessary. It is sufficient to say that it is clearly established by the great weight of author-

ity, that as a general rule, the consideration in an instrument under seal, as well as in a simple receipt, may be explained by parol evidence." Parol evidence that the consideration of a transfer of real estate was an oral agreement to pay certain debts of the grantor is not inadmissible as tending to create a trust by parol.<sup>1</sup> Where a deed is assailed for fraud, parol evidence is competent to show whether an additional consideration was paid.<sup>2</sup> A deed expressed to be in consideration of natural love and affection may be shown to have been for a valuable consideration.<sup>3</sup>

3. In *Ludeke v. Sutherland*, 87 Ill. 481; S. C. 29 Am. Rep. 66, land was deeded as "containing 140 acres more or less," and was paid for at the orally agreed price of \$27 an acre, and the consideration stated in the deed was the amount of that quantity at that price. Before the execution of the deed it was orally agreed that the land should be surveyed, and if it exceeded that quantity the purchaser should pay for the excess, and if it fell short the vendor should refund for the deficiency, at that rate. The quantity proving to be in excess, *held*, that the vendor was entitled to recover therefor, and that oral evidence was competent to prove the agreement.<sup>4</sup>

4. In *Bladen v. Wells*, 30 Md. 577, the court said: "We have found no case where the grantor has been allowed to aver, as against the grantee, that the amount of the consideration money, expressed in the deed as the price for the land thereby conveyed, is not the true contract between them in this particular, and there is no reason why any parol contract varying the deed in this respect should not be excluded by the general rule as much as if it varied the deed in any other part, and such have been the repeated decisions of courts of the highest authority." The reasoning of *Ludeke v. Sutherland*, *supra*, is that "the deed does not purport to embody the contract of the parties; it simply conveys the land in question in part fulfillment of the parol agreement. The statement of the consideration is in no sense a part

<sup>1</sup> *Brice v. Miller* (S. C.), 15 S. E. Rep. 272.

<sup>2</sup> *Casto v. Fry*, 33 W. Va. 449.

<sup>3</sup> *Nichols v. Burch*, 128 Ind. 324; 27 N. E. Rep. 737.

<sup>4</sup> To the same effect: *Mott v. Hurd*, 1 Root, 73; *Green v. Vardiman*, 2 Blackf. 324. See *Paine v. Upton*,

87 N. Y. 327; S. C. 41 Am. Rep. 371.

To the contrary: *Bradley v. Blodget*, Kirby, 22; S. C. 1 Am. Dec. 11; *Martin v. Hamlin*, 18 Mich. 354; *Bladen v. Wells*, 30 Md. 577; *Northrop v. Speary*, 1 Day 23; S. C. 2 Am. Dec. 48.

of the terms of the deed," and the "verbal agreement remains an integer in full force, and may be proved by parol."

5. In *Flynn v. Bourneuf*, 143 Mass. 277; S. C. 58 Am. Rep. 135, an action for breach of covenant against incumbrances in a deed, parol evidence that a few days before the execution of the deed the parties orally agreed, that in consideration of the execution of the deed for a certain sum, the plaintiff would assume a liability to an assessment upon the land for betterments, was held inadmissible, upon the ground that it directly contradicted the covenant. Precisely to the same effect is *MacLeod v. Skiles*, 81 Mo. 595; S. C. 51 Am. Rep. 254.

6. In *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34; S. C. 60 Am. Rep. 831, where an agent authorized to buy land, paid the sum mentioned in the deed, but orally agreed to pay more in the future, the principal, accepting the deed, was held liable for the additional consideration.

7. The consideration respectively paid by grantees may not be shown by parol for the purpose of showing that they took in different proportions.<sup>1</sup> Where a deed recites a money consideration it may be shown to have been the grantee's promise to execute a will in favor of the grantor.<sup>2</sup> And so his acknowledgment, before and after the execution of the deed, that it was in full of all claims against the grantor, including that in suit.<sup>3</sup> An absolute mortgage on land may be shown to have been executed as a mere indemnity on future advances.<sup>4</sup> The grantee may show that the sum paid was also in full of a claim against him for trespass on the land.<sup>5</sup> "The principal contract is not varied," said the court, "but is made to be the ground-work or consideration of another contract."

8. It may be shown by parol that the grantee bought with knowledge of a right of way over the land.<sup>6</sup> The court said: "The subject matter of the conveyance, its conditions and peculiarities, may be explained by parol without any contradiction of a deed. Do we contradict the conveyance of a tract of land when we permit it to be proved by parol that it is covered with timber,

<sup>1</sup> *Treadwell v. Bulkley*, 4 Day, 395; S. C. 4 Am. Dec. 225.

<sup>2</sup> *Manning v. Pippen*, 86 Ala. 357.  
See *Kimball v. Myers*, 21 Mich. 276; S. C. 4 Am. Rep. 487.

<sup>3</sup> *Groves v. Steel*, 2 La. Ann. 480; S. C. 46 Am. Dec. 551.

*Kimball v. Myers*, 21 Mich. 276; S. C. 4 Am. Rep. 487.

<sup>4</sup> *Moses v. Hatfield*, 27 S. C. 324.

<sup>5</sup> *Hodges v. Heal*, 80 Me. 281; 14 Atl. Rep. 11.

<sup>6</sup> *Wilson v. Cochran*, 48 Pa. St. 107; S. C. '86 Am. Dec. 574.

or is an improved farm, or contains a water-power, or has a private road upon it?" And so parol evidence is admissible to show that the grantee took the land subject to an incumbrance of which he knew,<sup>1</sup> "as part of the *res gestæ*, to prove the state of facts existing at the time of the conveyance." Citing *Leland v. Stone*, 10 Mass. 459. Where an incumbrance is not made a part of the consideration, and not deducted from it, and where it is not assumed by the grantee, the recital in a deed that the conveyance is subject to an incumbrance does not estop the grantee from showing that what purports to be an incumbrance is not one in fact, because of its invalidity.<sup>2</sup> Where a mortgage is conditioned as security for "any indebtedness," evidence may be adduced to show that it contemplated future indebtedness.<sup>3</sup>

*Contrary cases:* In a few jurisdictions the rule subjecting the consideration clause to contradiction or explanation is denied. Thus, in *Wilkinson v. Wilkinson*, 2 Dev. Eq. 377, it is said: "The consideration upon which a deed is made is an important part of the contract; and when it is distinctly declared, parol evidence is not more admissible to contradict or substantially to vary that, than any other terms upon which the parties have expressed their agreement." So in *Houston v. Blackman*, 66 Ala. 559; S. C. 41 Am. Rep. 756, it was held that a deed of lands from husband to wife, expressed to be in consideration of love and affection, and one dollar paid, is voluntary as to then existing creditors of the husband, and if assailed by them, parol evidence is incompetent to show a valuable consideration. In *Christopher v. Christopher*, 64 Md. 583, it is said: "It is a settled principle, that when a sum of money is named as the consideration in a deed, proof of a consideration, different in kind, is inadmissible. *Hurn's Lessee v. Soper* v. 6 H. & J. 276; *Betts v. Union Bank of Maryland*, 1 H. & G. 175; *Cole v. Albers*, 1 Gill. 412; *Thompson v. Corrie*, 57 Md. 200. The authorities just cited remove all doubt in relation to

<sup>1</sup> *Allen v. Lee*, 1 Ind. 58; S. C. 48 Am. Dec. 352.

<sup>2</sup> *Brooks v. Owen*, — Mo. —; 19 S. W. Rep. 723, citing:

*Purdy v. Coar*, 109 N. Y. 448.

*Russell v. Kinney*, 1 Sandf. Ch. 34.

*Hartley v. Tatham*, 10 Bosw. 273.

*Briggs v. Seymour*, 17 Wis. 255.

*Sewing Machine Co. v. Emerson*, 115 Mass. 554.

*Thompson v. Morgan*, 6 Minn. 292.

*Williams v. Thurlow*, 31 Me. 392.

*Baldwin v. Tuttle*, 23 Iowa, 66.

*Wood v. Broadley*, 76 Mo. 23.

*Cummins v. Wire*, 6 N. J. Eq. 73.

*Judson v. Dada*, 79 N. Y. 373.

*Parker v. Jenks*, 36 N. J. Eq. 398.

*Flanders v. Doyle*, 16 Ill. App. 508.

*Bishop v. Felch*, 7 Mich. 371.

*Martineau v. McCollum*, 4 Chand. (Wis.) 153.

<sup>3</sup> *Simons v. First Nat. Bank*, 93 N. Y. 269.

this question, and make it clearly apparent that the doctrine enunciated by the Lord Chancellor in *Clarkson v. Hanway*, 2 P. Wms. 204, and in *Bridgman v. Green*, 2 Ves. Sr. 626, has been fully recognized in this State. It therefore follows that when a sum of money is named as the consideration in the recital of a deed, it is not competent to adduce evidence tending to show that the real consideration was a gift from the grantor to the grantee."

### Sec. 93. Consideration—showing deed to be a mortgage.

In equity a deed may be shown by parol to have been intended as a mere mortgage.<sup>1</sup>

Some cases limit the admissibility to equity.<sup>2</sup>

Others admit the evidence either at law or in equity.<sup>3</sup>

<sup>1</sup> *Washburn v. Merrills*, 1 Day, 139; S. C. 2 Am. Dec. 59.

*Hodges v. Tennessee, etc. Ins. Co.* 8 N. Y. 416.

*Ryan v. Dox*, 34 N. Y. 307; S. C. 90 Am. Dec. 696.

*Ross v. Norvell*, 1 Wash. 14; S. C. 1 Am. Dec. 422.

*Walker v. Walker*, 2 Atk. 99.

*Dixon v. Parker*, 2 Ves. Sen. 225.

*Holmes v. Mathews*, 9 Moore P. C. 413.

*Langton v. Horton*, 5 Beav. 9.

*Joynes v. Statham*, 3 Atk. 388.

*Jackson v. Lodge*, 36 Cal. 28.

*Houser v. Lamont*, 55 Pa. St. 311; S. C. 93 Am. Dec. 755.

*Hudson v. Isbell*, 5 Stew. & P. 67.

*Wright v. Bates*, 13 Vt. 341.

*Johnson v. Smith*, 39 Iowa, 549.

*Sweet v. Parker*, 22 N. J. Eq. 453.

*Horn v. Keteltas*, 46 N. Y. 605.

*Baughner v. Merryman*, 32 Md. 185.

*Nichols v. Cabe*, 3 Head, 93.

*Hurford v. Harned*, 6 Oreg. 362.

*Snavelly v. Pickle*, 29 Gratt. 27.

*Anthony v. Anthony*, 23 Ark. 479.

*Holton v. Meighen*, 15 Minn. 69.

*Ruckman v. Alwood*, 71 Ill. 155.

*Heath v. Williams*, 30 Ind. 495.

*Littlewort v. Davis*, 50 Miss. 403.

*Schade v. Bessinger*, 3 Neb. 140.

*Malone v. Roy*, 94 Cal. 341.

*Edrington v. Harper*, 3 J. J. Marsh, 354; S. C. 20 Am. Dec. 145.

*Campbell v. Dearborn*, 109 Mass. 130; S. C. 12 Am. Rep. 671.

*Klinck v. Price*, 4 W. Va. 4; S. C. 6 Am. Rep. 268.

*Morris v. Budlong*, 78 N. Y. 543.

*Hassam v. Barrett*, 115 Mass. 256.

*Logue's Appeal*, 104 Pa. St. 136.

*Peugh v. Davis*, 96 U. S. 332.

*Turpie v. Lowe*, 114 Ind. 37.

*Cullen v. Carey*, 146 Mass. 50.

*Barry v. Hamburg, etc. Co.* 110 N. Y. 1.

*Tower v. Fetz*, 26 Neb. 706; S. C. 18 Am. St. Rep. 795.

*Beroud v. Lyons*, — Iowa, —; 52 N. W. Rep. 486.

*Barry v. Colville*, 25 N. Y. State Rep. 658.

<sup>2</sup> *McClane v. White*, 5 Minn. 178.

*Hogel v. Lindell*, 10 Mo. 483.

*Moore v. Wade*, 8 Kans. 380.

*Bragg v. Massie*, 38 Ala. 89; S. C. 79 Am. Dec. 82.

<sup>3</sup> *Fuller v. Parrish*, 3 Mich. 211.

*Kent v. Agard*, 24 Wis. 378.

*Plumer v. Guthrie*, 76 Pa. St. 441.

*Johnson v. Sherman*, 15 Cal. 287.

*Peugh v. Davis*, 96 U. S. 332.

*Contrary doctrine:* But in a very few cases it is held that a deed may not be converted into a mortgage in the absence of fraud, oppression, ignorance or mistake.<sup>1</sup>

## **Sec. 94. Consideration—illegal.**

But the consideration of a deed may not be impeached on account of its illegality as between the parties.

The expression is frequent in the books that a "deed" may be avoided on account of illegality of consideration. But it will be found on examination that the word "deed" in such passages is used in the sense of an executory specialty, and never to indicate an absolute grant of lands. When a party undertakes to enforce a bond on a sealed note or a mortgage, or the like, the defendant may show by parol that the consideration was illegal, because the court will not suffer its process to be used in the accomplishment of a wrong. But if the wrong has been accomplished, the court will not listen to a party to it who seeks to undo his participancy and get back what he has illegally granted. If parties should execute a sealed contract for the sale and purchase of lands, and either party should refuse performance, and the court should be asked to decree specific performance, oral evidence would be competent to prove that the consideration was immoral or otherwise in violation of law; but not so where the executory contract has ripened into performance, although the performance may be an evil fruit. A deed is a mere certificate and evidence of the passing of title, and where title has passed the court will not tolerate the grantor in alleging that he parted with his land for an unlawful compensation.<sup>2</sup>

The consideration of a mortgage may be shown to be illegal because it is a collateral security to an executory specialty, the bond, and also because the title to the mortgaged lands does not pass without the aid of the court.<sup>3</sup> So evidence is competent, in an action for foreclosure, to show that a mortgage was given to compound a felony.<sup>4</sup>

*Illustrations:* 1. In *Inhabitants of Worcester v. Eaton*, 11 Mass. 375, cited in the last case, the court said: "The deed so given was

<sup>1</sup> *Richard v. Harrill*, 2 Jones Eq. 209.  
*Chaires v. Brady*, 10 Fla. 133.  
*McDonald v. McLeod*, 1 Ired. Eq. 221.

<sup>2</sup> See Chap. — on Illegal Agreements.  
*Collins v. Blantern*, 2 Wils. 341.

<sup>3</sup> *Jones Mortg.* § 617.  
*Moffitt v. Bulson*, — Cal. —; 30 Pac. Rep. 1022.  
*Peed v. McKee*, 43 Iowa, 689; S. C. 20 Am. Rep. 631.

not void, nor was it voidable. \* \* A bond or other obligation, or a written promise, founded upon such a consideration, may be avoided, because the law will not uphold a contract, or permit a party to enforce it, if it was made to secure the price of an unlawful act. \* \* \* But it has been holden in numerous other cases, that where money has in fact been paid upon such consideration, it cannot be recovered back, because *in pari delicto potior est conditio defendentis*. \* \* \* If then the composition of a felony, or of a larceny, is an illegal consideration of any promise or obligation for money, the party claiming under such instrument cannot enforce it in a court of justice, nor can the other party, if he has paid it, recover it back again. \* \* \* A deed of bargain and sale, signed, sealed, delivered, acknowledged and recorded, is an actual transfer of the land to the grantee, as much as the delivery over of a sum of money, or of a personal chattel, is a transfer of either of those." This case is cited with approval in *Mills v. Rice*, 6 Gray, 465, where it is said, "if lands are conveyed in conformity with, or in satisfaction of an illegal contract, the title of the grantee cannot be defeated or disturbed." The same doctrine is laid down in *Hale v. Jewell*, 7 Greenl. 435; S. C. 22 Am. Dec. 212, in respect to an attempt to avoid a deed for usury, citing *Boardman v. Roe's Trustee*, 13 Mass. 104, and *Flint v. Sheldon*, id. 443; S. C. 7 Am. Dec. 162; and so in *Moore v. Adams*, 8 Ohio, 372; S. C. 32 Am. Dec. 723, in respect to compounding a felony.

2. *Hill v. Freeman*, 73 Ala. 200; S. C. 49 Am. Rep. 48, was the case of a deed executed and delivered in consideration of future illicit intercourse. The court said: "The title of the land conveyed nevertheless passed to the grantees, and being in possession under their deed, they cannot be dispossessed by the heirs of Hill, who can have no greater claim or right than the deceased grantor had. It is plain that such a contract, if unexecuted, could not be enforced in any court. Such was the ruling of this court in *Walker v. Gregory*, 36 Ala. 180. But the deed being executed and delivered, and the grantees being in possession, ejectment will not then lie to dispossess them. The maxim applies, *in pari delicto potior est conditio possidentis*."

3. In *Clark v. Colbert*, 67 Ala. 92, the court said: "There can be no question that the composition of the felony, and the dismissal of the prosecution for a valuable consideration, was a highly penal offense, and that all who aided and abetted in its perpetration

were participants in the guilt. Any executory contract, or promise based on such consideration, is illegal, and no suit can be maintained for its enforcement. *Ex turpi causa non oritur actio*. No one can recover, who, to establish his claim, must trace his right through such illegal transaction. This is common knowledge. Courts can give no sanction to such flagrant violations of law. Add. Cont., § 258; 1 Brick. Dig., 381; Collins v. Blantern, 1 Smith Lead. Cas. [161] and English notes; Benjamin Sales, §§ 503-4. The present case arises however not on an executory, but on an executed contract. The plaintiffs seek to regain property which they conveyed away by deed, on the ground that the consideration was illegal—a violation of positive law. Walker v. Gregory, 36 Ala. 179, was a suit to recover slaves which had been conveyed to the plaintiff on an immoral consideration. To establish her cause of action, she was forced to rely on the contract, which was founded on such illegal consideration. This court held she could not recover. It was added, that if she had been in possession of the slaves, and the administrator had sought to recover them from her by suit, probably she might have protected herself under the maxim, *potior est conditio possidentis*. Denton v. English, 2 Nott. & McC. 581, holds that an executed contract, founded on an immoral consideration, is binding on the parties. In Gray v. Roberts, 2 A. K. Marsh. 208, the court said: 'If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either, for it is a settled rule, that *in pari delicto potior est conditio defendentis*.' S. C., 12 Am. Dec. 383. In Waite v. Merrill, 16 id. 238 (4 Greenl. 102), it was held that money paid on an illegal contract, voluntarily, knowingly, cannot be recovered back. The case of Inhabitants of Worcester v. Eaton, 11 Mass. 368, is not distinguishable from this."

4. In Myers v. Meinrath, 101 Mass. 367; S. C. 3 Am. Rep. 368, it was said: 'The policy of the law is to leave the parties in all such cases without remedy against each other.' In 1 Story Eq. Jur., § 298, is the following language: 'In general (for it is not universally true), where parties are concerned in illegal agreements, or other transactions, whether they are *mala prohibita*, or *mala in se*, courts of equity, following the rule of law as to participation in a common crime, will not at present interpose to grant any relief; acting upon the known maxim, '*in pari delicto, potior est conditio defendentis et possidentis*.' I say at present, for there has



been considerable fluctuation of opinion, both in courts of law and equity on this subject. The old cases often gave relief, both at law and equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort."

5. In *Marksbury v. Taylor*, 10 Bush, 519, it was held that an executed contract, based upon illicit sexual commerce, cannot be set aside at the instance of the grantor or his heirs-at-law, who cannot occupy in court a better position than their ancestor through whom they claim.

6. In *Gisaf v. Neval*, 81 Penn. St. 356, a man seduced a woman and induced her to submit to an operation for abortion, resulting in her serious sickness and suffering. After her recovery he said he would buy her a house for what she had suffered for him. She contracted for a house, he gave her the purchase-money, and she paid for it before and at the time the deed was delivered to her. *Held*, that no trust resulted to him, by his furnishing the purchase-money. The court said: "That 'an immoral consideration will never support a contract,' as was said by the learned judge of the court below, in that portion of his charge contained in the sixth specification, is doubtless true as an abstract proposition. But it has no application to this case. The defendant is not seeking to enforce such a contract. The contract, so far as one existed, has been fully executed. This is the case of a man who has wronged a woman, who has made her a compensation for the injury, and who now seeks to recover it back. In this the law will not help him. As he has sown, so must he reap."

7. To the same effect, *Ayerst v. Jenkins*, L. R., 16 Eq. 275; S. C., 6 Moak Eng. 756, where Selborne, L. Ch., said: "The voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while its object is yet unaccomplished, a gift intended as a bribe to iniquity. \* \* \* Lord Eldon asked whether there had been any case upon the distinction between a recompense for past, and a provision for future cohabitation, where the court, finding the woman in actual possession of the property, has upon that ground had it taken out of her hand? The distinction,' he added, 'upon the

doctrine of *premium pudicitiae*, has prevailed in the case of restraining her from enforcing a security. But I doubt whether there is any instance of taking the property out of her hands, except as to creditors.' "

A deed in fraud of creditors may not be impeached by the grantor.<sup>1</sup>

"The consideration expressed in a deed may not be disproved for the purpose of defeating the conveyance, unless it be on the ground of fraud."<sup>2</sup>

*Contrary doctrine:* There is very little authority to the contrary. In *Fenwick v. Ratliff's Representatives*, 6 T. B. Monr. 154, it was held that a deed might be avoided by parol proof of usury, and the right to impeach the consideration for illegality seems to be implied in *Haigh v. Kaye*, L. R. 7 Ch. App. 473. And in *Reynell v. Sprye*, 1 DeG. M. & G. 672, it is said by Knight Bruce, L. J.: "The rule is settled (and not merely in courts of equity) that a deed *ex facie* just and righteous, may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose, contravening law or public policy," citing *Collins v. Blantern*, 2 Wils. 341, which was however the case of a bond. This seems to have been also *obiter*, for the judge himself characterized the observations as made "perhaps superfluously." The suit was to set aside a deed of lands for fraud and champerty, and the ground of fraud was regarded as sufficient both by the judge above mentioned, and by Vice-Chancellor Wigram, before whom the case was tried (8 Hare, 221, 253).

In *Trustees v. Dickenson*, 1 Dev. 189, where a deed of slaves was held illegal because the transfer was to Quakers for the purpose of effecting an emancipation, the parol evidence was not objected to (see p. 197), and the defendant was a stranger to the deed (see p. 200). *Dale v. Roosevelt*, 9 Cow. 307, cited as an authority for the admission of parol evidence that the consideration of a deed is unlawful, was an action on a covenant to convey lands. *Kemper v. Kemper*, 3 Rand. 8, cited to the same doctrine, was an action to stay the sale under a deed of trust; the deed was held valid; and what was said on this point was *obiter*. *Wilhite*

<sup>1</sup> *Ellis v. Higgins*, 32 Me. 34.

*Evans v. Herring*, 3 Dutch. 243.

*Huey's Appeal*, 29 Pa. St. 219.

*George v. Williamson*, 26 Mo. 190.

*Getzler v. Saroni*, 18 Ill. 511.

*Beale v. Hall*, 22 Ga. 431.

<sup>2</sup> *Morse v. Shattuck*, 4 N. H. 229; S. C. 17 Am. Dec. 419.

v. Roberts, 4 Dana, 174, was the case of a bond, and so of Love v. Buckner, 4 Bibb, 506, and Pope v. St. Leger, 5 Mod. 3.

*Distinction between executory contract and deed:* The distinction between an executory contract and a deed in this respect is clearly pointed out in Donley v. Tindall, 32 Tex. 42; S. S. 5 Am. Rep. 234: "In Cowen & Hill's Notes to Phil. Ev., part 2, note 304, it is said: 'The rule confining the operation of parol evidence within the limits of strict exposition or interpretation assumes that the instrument has a legal existence and is valid.' 'Testimony to show it to be void, is always pertinent, no matter who are the parties or in what court the question arises.' Deeds however cannot be avoided on all the grounds which apply to simple contracts. Hence, what might be a relevant inquiry as to the latter would not necessarily be in respect to the former. But in regard to *illegality* of consideration, both will usually be found to stand upon the same footing in this particular. It is not my purpose (because it is not necessary in this case) to discuss the correctness of the proposition with respect to deeds. There are however a number of respectable authorities in its support. In the case of Dale v. Roosevelt, 9 Cow. 310, a deed was avoided upon proof that the consideration was simoniacal;<sup>1</sup> and in other cases where the consideration was the sale of an office, money won at play, or generally for anything either *mala in se*, *mala prohibita*, contrary to *public policy*, etc. etc. So it was expressly held in the case of Phelps v. Decker, 10 Mass. 274. In that case it was broadly laid down 'that by the common law deeds of conveyance or other deeds made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful in itself, or in consequence of any prohibitory statute, are void *ab initio*, and may be avoided by plea; or on the general issue *non est factum* the illegality may be given in evidence. But this in a later case (11 Mass. 375) has been overruled, and the position assumed that a deed of conveyance could not, as such, be avoided by a party on the ground of having been made in consideration of a felony having been compounded. But the distinction is clearly drawn between bonds and contracts *sought to be enforced* and *actual conveyances* of lands or other property. It is admitted that the former may be avoided, but the latter, it is said, 'are to be treated in all cases as actual trans-

<sup>1</sup> This is incorrect. The action was to enforce payment of an executory sealed contract.

fers, so far as the immediate parties are concerned, and governed by the same rule as the payment of money or the delivery of a chattel.' That this case lays down the correct rule I am well satisfied. The principle inflexibly observed in such cases is that courts will neither aid in the execution of an illegal executory contract nor relieve a party who has executed it. A deed is not a bond or simple contract which remains to be executed, but is a thing done, and when done contrary to the prohibitions of the law, or when it consummates an illegal contract, the law leaves the party executing it to the consequences of his illegal act. And for this very reason it is that courts will permit the defense of illegality to be made; not certainly for the purpose of aiding or benefiting the defendant, but because they will not be instruments in their execution."

In *Haigh v. Kaye*, 7 Ch. App. 453, James, L. J., said: "If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it."

*Executed transfer*: "A completely executed transfer of property, though originally made upon an unlawful consideration, or in pursuance of an unlawful agreement, is afterwards valid and irrevocable both at law and in equity."<sup>1</sup> "It is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of a deed, in creating or passing a title to the estate hereby granted."<sup>2</sup> It may not be shown that a deed was executed to stifle a prosecution for perjury.<sup>3</sup>

## Sec. 95. Acknowledgment.

An acknowledged deed may be proved by parol.<sup>4</sup>

<sup>1</sup> Pollock Cont. 324, 333.

See also *Ayerst v. Jenkins*, 16 Eq. 275.

*Railroad Co. v. Mathers*, 71 Ill. 598.

*Adams v. Barrett*, 5 Ga. 414.

*Setter v. Alvey*, 15 Kan. 157.

*Dixon v. Olmstead*, 9 Vt. 310.

*Dumont v. Dufore*, 27 Ind. 263.

*Ratcliffe v. Smith*, 13 Bush. 172.

<sup>2</sup> 3 Wash. Real Prop. \*614.

<sup>3</sup> Devlin Deeds, § 807.

*Moore v. Adams*, 8 Ohio, 372; S. C. 32 Am. Dec. 723.

<sup>4</sup> *Munger v. Baldrige*, 41 Kans. 236; S. C. 13 Am. St. Rep. 273.

*Floyd v. Ricks*, 14 Ark. 286; S. C. 58 Am. Dec. 374.

*Webb v. Burney*, 70 Tex. 322.

*Westhafer v. Patterson*, 120 Ind. 459; S. C. 16 Am. St. Rep. 330.

## Sec. 96. Acknowledgment—between the parties.

Between the parties to a deed the acknowledgment may be impeached by parol evidence for fraud, collusion, or imposition, but not otherwise.<sup>1</sup>

So parol evidence is admissible to prove that the grantor did not appear before the acknowledging officer.<sup>2</sup> Or that the wife's acknowledgment was procured by duress. Parol evidence is not admissible to supply a palpable defect in an acknowledgment.<sup>3</sup> In the last case the court said: "What the law requires to be done and appear of record can only be done and made to appear by the record itself, or an exemplification of the record." Mr. Wharton says (2 Ev. sec. 1053), "Where an acknowledgment is defective in any of its averments, these may be supplied by parol proof." But the single case cited to support this (*Carpenter v. Dexter*, 8 Wall. 513), by no means warrants the statement, as in that case no extrinsic proof was given, but the defect was supplied by reference to the instrument itself, and Mr. Wharton cites several State decisions to the contrary. But parol evidence is admissible to correct a mistaken statement in an acknowledgment, for the purpose of effectuating the deed in favor of innocent grantees. The acknowledgment of a mortgage of real estate was in the form, "E. County, ss.: Before the subscriber, a justice of the peace of said county," etc. The justice was of C. county,

<sup>1</sup> *Hector v. Glasgow*, 79 Pa. St. 79.

*Hartley v. Frosh*, 6 Tex. 208.

*Hays v. Hays*, 5 Rich. 31.

*Montgomery v. Hobson*, Meigs, 437.

*Williams v. Robson*, 6 Ohio St. 510.

*Borland v. Walrath*, 33 Iowa, 130.

*Wannell v. Kem*, 57 Mo. 478.

*Hourtienne v. Schnoor*, 33 Mich. 274.

*Graham v. Anderson*, 42 Ill. 514; S. C.

92 Am. Dec. 89.

*Kerr v. Russell*, 69 Ill. 666; S. C. 18 Am. Rep. 634.

*Cover v. Manaway*, 115 Pa. St. 338; S. C. 2 Am. St. Rep. 552.

*Green v. Godfrey*, 44 Me. 25.

<sup>2</sup> *Smith v. Ward*, 2 Root, 378; S. C. 1 Am. Dec. 80.

*Strauch v. Hathaway*, 101 Ill. 11; S. C. 40 Am. Rep. 193.

*Kocourek v. Marak*, 54 Tex. 201; S. C. 38 Am. Rep. 623.

<sup>3</sup> *First Nat. Bank of Harrisburgh v. Paul*, 75 Va. 594; S. C. 40 Am. Rep. 740.

*Barnet v. Barnet*, 15 S. & R. 72; S. C. 16 Am. Dec. 516.

*Ennor v. Thompson*, 46 Ill. 214.

*Harty v. Ladd*, 3 Ore. 353.

*Elliott v. Peirsol*, 1 Pet. 328.

To the same effect:

*Barnett v. Shackelford*, 6 J. J. Marsh. 532; S. C. 22 Am. Dec. 100.

*Watson's Lessee v. Bailey*, 1 Binn. 470; S. C. 2 Am. Dec. 462.

*Jourdan v. Jourdan*, 9 S. & R. 268; S. C. 11 Am. Dec. 724.

*Cox v. Holcomb*, 87 Ala. 589; S. C. 13 Am. St. Rep. 79.

*Merritt v. Yates*, 71 Ill. 636; S. C. 23 Am. Rep. 128.

the land was situated there, and the mortgage was recorded there. *Held*, (1) that the mortgage was properly on the record, and was a notice to subsequent purchasers; and (2) that parol evidence was admissible to show that the acknowledgment was taken in C. county.<sup>1</sup>

### Sec. 97. Acknowledgment as to innocent grantees.

Parol evidence is inadmissible to impeach the acknowledgment as against an innocent grantee without notice.

It was so held in *Kerr v. Russell*, 69 Ill. 666; S. C. 18 Am. Rep. 634, where it was claimed that the signature of the grantor's wife was forged. The court say: "Is an innocent purchaser for value, without notice of anything of this kind, to suffer? Can she avoid the deed as against him? Reason, justice, common honesty say not. On general principles, a purchaser for value, without notice of any adverse claim or secret equities, cannot be disturbed and we see no reason why the same rule should not prevail in kindred cases.<sup>2</sup> The Supreme Court of Illinois, however seem to have reconsidered the doctrine of *Kerr v. Russell*, above, for in *Strauch v. Hathaway*, 101 Ill. 11; S. C. 40 Am. Rep. 193, they imply that even as against an innocent grantee the acknowledgment may be impeached for fraud. They say: "Mr. Wharton, in discussing this subject in his work upon Evidence, says: 'The true view is that a certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal between the parties by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the officer to certify, if within his jurisdiction. 2 Whart. Ev., § 1052. This court has not gone to the full extent of the latter proposition. While we hold the certificate shall not be deemed conclusive in any case so as to cut off all inquiry, yet where there is no evidence of fraud, conspiracy or overreaching of any kind, or anything casting suspicion upon

<sup>1</sup> *Angier v. Schieffelin*, 72 Penn. St. 106; S. C. 13 Am. Rep. 659.

<sup>2</sup> To the same effect:

*Kocourek v. Marak*, 54 Tex. 201; S. C. 38 Am. Rep. 623.

*Johnston v. Wallace*, 53 Miss. 331; S. C. 34 Am. Rep. 699.

*Miller v. Wentworth*, 82 Pa. St. 280.

*White v. Graves*, 107 Mass. 325; S. C. 9 Am. Rep. 38.

*Singer Manf. Co. v. Rook*, 84 Pa. St. 442; S. C. 24 Am. Rep. 204.

See note 14 Moak Eng. 499.

the integrity or honesty of the certifying officer, and the certificate of acknowledgment is in conformity with the statute, it can not be impeached by merely negating the facts therein stated. Where the controversy is between the former owner and an innocent purchaser, as in the present case, before the title of the latter can be thus impeached, the evidence shall be clear and conclusive, excluding every reasonable doubt. The evidence in this case is not of that character." These remarks were *obiter*, and no mention was made of *Kerr v. Russell*. This is the only expression of this doctrine which I have found.

## Sec. 98. Explanation of ambiguities.

Parol evidence is admissible to explain an ambiguity in a deed, as to boundaries or other descriptions of land conveyed, or as to the names or identity of the parties, or as to the date, or any other ambiguity, and to aid in deciphering any obscurity in the writing.

1. In *Stone v. Clark*, 1 Metc. 378; S. C. 35 Am. Dec. 370, it was held: "When the language used in a deed to describe the premises meant to be conveyed is ambiguous, equivocal or insufficient, the subsequent acts or declarations of the parties, showing the practical construction put upon the words of description by them, may be resorted to for the purpose of ascertaining their intention."<sup>1</sup>

2. In *Hall v. Davis*, 36 N. H. 569, oral evidence was admitted to define the words "Derry old line." The court said: "If the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments, boundaries or lines, to several writings, or the terms be vague or general, or have divers meanings, in all these and the like cases, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things

<sup>1</sup> Cited in *Linney v. Wood*, 66 Tex. 22.  
To the same principle, *Jackson v. Perrine*, 35 N. J. L. 137.  
*Den v. Van Houten*, 2 Zab. 61.  
*Opdyke v. Stephens*, 4 Dutch. 283.  
*Livingston v. TenBroeck*, 16 Johns. 14;  
S. C. 8 Am. Dec. 287.  
*Crafts v. Hibbard*, 4 Metc. 438.  
*Choate v. Burnham*, 7 Pick. 274.

*Frost v. Spaulding*, 19 Pick. 445; S. C. 31 Am. Dec. 150.  
*Hastings v. Stark*, 36 Cal. 122.  
*Wheelock v. Moulton*, 15 Vt. 519.  
*Raymond v. Coffey*, 5 Oreg. 132.  
*Gratz v. Beates*, 45 Pa. St. 495.  
*Kennedy v. Lubold*, 88 Pa. St. 246.  
*Stewart v. Patrick*, 68 N. Y. 450.  
*Wood v. Boyd*, 28 Ark. 75.

were intended by the party, or to ascertain his meaning in any other respect; and this without any infringement of the general rule, which only excludes parol evidence of other language, declaring the meaning of the parties, than that which is contained in the instrument itself." This was approved in *Putnam v. Bond*, 100 Mass. 58; S. C. 1 Am. Rep. 82, where evidence was admitted to define "Shirley line" and "Lunenburg line."

3. In *Miles v. Barrows*, 122 Mass. 581, the court said: "A conveyance of land can only be by deed, and parol evidence is not admissible to control or vary a deed. If the description in it is certain and unambiguous, it is not competent to prove that the parties had any intention different from that expressed. But if upon applying the deed to the land, it is found to be ambiguous, parol evidence of the surrounding circumstances and of the acts of the parties is competent to aid in the interpretation of the deed, and to enable the court to ascertain what was the intention of the parties in the words which they have used." So in *Blow v. Vaughan*, 105 N. C. 198, where there was a covenant to convey part of a five-hundred-acre tract, with a reference to lines of a previous conveyance, evidence was admitted to fix the quantity and boundaries.<sup>1</sup>

4. In *Lanman v. Crooker*, 97 Ind. 163; S. C. 49 Am. Rep. 437, a mortgage was executed upon land, excepting "twenty acres from the north-east corner of said above-described tract of land, formerly deeded to Wm. Davis and Emeline M. Davis." In an action to recover the said twenty acres, *held*, that parol evidence was admissible to show that the twenty acres intended to be excepted was not in the north-east corner, but off the south end. The court said: "The mortgage embraced the entire west half of the quarter section except twenty acres. These are described as 'twenty acres from the north-east corner, \* \* \* formerly deeded to Wm. Davis and Emeline Ann Davis.' This description contains two calls—one as land in the 'north-east corner,' and the other as land 'formerly deeded to Wm. Davis and Emeline Ann Davis.' If this land was never deeded, as stated, then both calls are not correct descriptions, one or the other is false, and if one is true and the other false, the false must be rejected and the description read as though it did not contain the false call. *Worthington v. Hylyer*, 4 Mass. 196; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66; *Piper v. True*, 36 Cal. 606. The first call cannot be said to be false unless the sec-

<sup>1</sup> *Cock v. Taylor*, 2 *Overton*, 49; S. C. 5 Am. Dec. 650.



ond is true and is different from the first. The falsity of the first is not shown by the language of the description itself, but this may be shown by evidence *aliunde*. *Harris v. Doe*, 4 Blackf. 369; *Symmes v. Brown*, 13 Ind. 318. \* \* \* The deed offered in evidence showed that twenty acres of this land had formerly been deeded to Amelia Davis. This conveyance corresponds with the description except the names. In this respect there is a variance, but this variance does not, as we think, vitiate the description and render it inapplicable to this land. Without the names the description shows that twenty acres of the land had been formerly deeded, and this conveyance satisfies the description in the absence of proof that some other conveyance had been made to these persons. In *Getchell v. Whittemore*, 72 Me. 393, a similar question arose. The defendant executed a mortgage upon certain real estate, except a lot which was described as having been conveyed to him by Roswell Hitchcock. Roswell Hitchcock had not conveyed the lot to him, but Urban L. Hitchcock had, and it was held that though the name was different, this fact did not vitiate the description, and that the same applied to the lot actually conveyed. In *Abbott v. Abbott*, 51 Me. 575, the land conveyed was described 'as surveyed by Israel Johnson and Isaac Boynton.' They had not surveyed the land, but one Harvey had, and the court held that though the names were different, it was a question of fact whether the Harvey line was not intended. No greater variance exists in this case than in the above cases. After dropping the names an equally sufficient description remains, and this description applies to the land embraced in the conveyance. Whether it was so intended depends upon the proper construction of the description in the light of the attending circumstances. These may be shown, as has been said, by extrinsic evidence; it may be shown that the twenty acres formerly deeded was off the south end, and not out of the north-east corner. Thus, if the premises are bounded by land of A. on the north, and A.'s land is on the south, it may be proved that it was intended as the southern boundary. *White v. Eagan*, 1 Bay (S. C.), 247. So if bounded on 'Broad river,' it may be proved that 'Catawba river,' was intended. *Middleton v. Perry*, 2 Bay, 539. *Abbott v. Abbott*, *supra*. The evidence excluded tends to show that no other land was 'formerly deeded,' and hence tends to show that the excepted land was not in the north-east corner. If no other land was deeded, we have two conflicting descriptions, one

describing twenty acres in the north-east corner, and the other twenty acres off the south end. One or the other must be rejected, as obviously both were not intended. The rule in such cases is to apply the description to the land actually owned, and to adopt such construction as best comports with the manifest intention of the parties and the circumstances of the case. *Drew v. Drew*, 28 N. H. 489; *Piper v. True*, *supra*; *Bell v. Sawyer*, 32 N. H. 72. Applying this rule, in the light of the facts, the excluded evidence tended to prove, we think it manifest, that these parties intended to except twenty acres off the south end. The mortgage embraced the entire west half except twenty acres; the mortgagors owned the entire west half except twenty acres; they excepted twenty acres formerly deeded; the twenty acres formerly deeded were off the south end, and it is therefore apparent that they intended to except such twenty acres. This conclusion is also strengthened by the presumption that they intended to mortgage their own land, and not the land of another. As the evidence excluded tended to show that the second call was true and the first false, the first may be rejected without impairing the description. *Worthington v. Hylyer*, *supra*; *Ousby v. Jones*, 73 N. Y. 621. The fact that the twenty acres in the north-east corner had not been 'formerly deeded' created a latent ambiguity, and as the evidence offered tended to remove it, the court erred in excluding it." To the same effect, *Clark v. Munyan*, 22 Pick. 410; S. C. 33 Am. Dec. 752.

5. Where the grant was of the "south fractional half of fractional section twenty-nine," etc., oral evidence was admitted to identify the premises.<sup>1</sup> A deed conveyed "a certain tract or parcel of land, \* \* \* containing, by estimation, 890 acres of land," lying in a named land district "on Cow bayou and Bull Hide streams, patented to the heirs of James Stewart for 960 acres." *Held*, that the deed was not void on its face for insufficiency of description, and it appearing that two tracts in the same vicinity were patented to the heirs of James Stewart for 960 acres, it was for the jury to determine whether the tract described was the one sued for.<sup>2</sup> Where a deed conveyed land as a numbered block, as marked on the plat of the grantor's addition to a town, this evidences the existence as against him of such a plat; and evidence tending to show a survey of the town prior to

<sup>1</sup> *Swayne v. Vance*, 28 Ark. 282.

<sup>2</sup> *Cox v. Hart*, 12 Sup. Ct. Rep. 962.

See also *Cato v. Stewart*, id. 146.

the conveyance, and that the grantor produced the plat in question some years afterwards as such plat, is sufficient to identify it as that mentioned in the deed.<sup>1</sup>

6. In *Summerlin v. Hesterly*, 20 Ga. 689; S. C. 65 Am. Dec. 639, parol evidence was admitted to show in ejectment for fractional lot number 189, to supplement an execution and levy on "fractional lot, whereon John Smith now lives, No. 181," that at the time John Smith lived on lot 189 and that it was a fractional lot. In *French v. Hays*, 43 N. H. 30; S. C. 80 Am. Dec. 127, declarations of a party were admitted to determine to which of two paths an ambiguous description in a partition deed was intended to apply. In *Haven v. Brown*, 7 Greenl. 421; S. C. 22 Am. Dec. 208, to show what was the language in a bond for a deed, the writing being obscure and worn, parol evidence of declarations of a party at and immediately after the execution thereof were allowed. In *Emery v. Webster*, 42 Me. 204; S. C. 66 Am. Dec. 274, parol evidence was allowed to show the meaning of the words "old channel" of a stream, on the principle of the identification of monuments. So of "swamp land."<sup>2</sup> So of "any lot on the plat in the town of South Bend."<sup>3</sup> Parol evidence is permitted to show the true date of a deed, where the name of the month is obscure.<sup>4</sup> And so to supply the date in an undated mortgage.<sup>5</sup> And to show quantity and boundaries when the deed is silent.<sup>6</sup> In *Prentiss v. Brewer*, 17 Wis. 635; S. C. 86 Am. Dec. 730, extrinsic evidence was received to show that by the words "south half" of a certain quarter section, the parties meant one-half in area and not one-half according to the government survey. And in *Lego v. Medley*, 79 Wis. 211; S. C. 24 Am. St. Rep. 706, to locate "one acre from the southwest corner of the southwest quarter of the southwest quarter of section 10, together with the buildings thereon." In *Palmer v. Farrell*, 129 Pa. St. 162; S. C. 15 Am. St. Rep. 708, evidence was allowed to show that a "bank" referred to as a boundary was artificial, and that the grantee knew that certain flats were reserved. In *Price v. Ferguson*, 66 Miss. 404, the language being "Ten acres in S. E.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  sec. 33, same being all S. E.  $\frac{1}{4}$  except the

<sup>1</sup> *Redd v. Murry*, — Cal. —; 24 Pac. Rep. 841.

<sup>2</sup> *Morton v. Jackson*, 1 Sm. & Marsh, 494; S. C. 40 Am. Dec. 107.

<sup>3</sup> *Colerick v. Hooper*, 3 Ind. 316; S. C. 56 Am. Dec. 505.

<sup>4</sup> *Fenderson v. Owen*, 54 Me. 372; S. C. 92 Am. Dec. 551.

<sup>5</sup> *Burditt v. Hunt*, 25 Me. 419; S. C. 43 Am. Dec. 289.

<sup>6</sup> *Cock v. Taylor*, 2 Overton, 49; S. C. 5 Am. Dec. 650.

interest of Martin (17 acres) and Hunter (13 acres)," evidence was admitted to apply it. In *Black v. Pratt, etc., Co.*, 85 Ala. 504, land being conveyed only by numbers of section, township, and range, with the addition of "all that part lying south of Black creek," parol evidence was admitted to identify it. In *Giddings v. Lea*, — Tex. —; 19 S. W. Rep. 682, where a sheriff's deed described land as "one-third of a league of land known as survey No. 290, on David's creek, a branch of the Colorado river, about one mile from the mouth of said river, and about twelve miles from the mouth of the Concho, described in letters patent dated the 15th day of October, A. D. 1851," parol evidence was employed to identify the land. In *Wead v. St. Johnsbury, etc., R. Co.*, — Vt. —; 24 Atl. Rep. 364, it was held that where the owners of land convey it, bounding it by the line of a highway, parol evidence is admissible to show whether, by such description, the parties meant the surveyed line of the highway, or the line as actually used and occupied. So to show that the quantity of water on each side of an island was such as to be called by the name of a river given in the deed, and then to explain this ambiguity by showing which stream was intended.<sup>1</sup> So to show what was usually let or occupied with the premises conveyed, when it is not apparent on the face of the deed.<sup>2</sup> So to repair an insufficient description of the grantees, and supply the number of the block.<sup>3</sup> Reputation is sufficient to show the *locus in quo* when not clearly shown by the deed.<sup>4</sup>

7. In *Bybee v. Hageman*, 66 Ill. 519, the description in a mortgage was "one acre and a half in the northwest corner of section five, together with the brewery," etc. Inasmuch as there were several sections of that number in the county, parol evidence was held admissible to locate the premises. So similar evidence was admitted in *Shore v. Miller*, 80 Ga. 93; S. C. 12 Am. St. Rep. 239, to explain "parts" of certain lots. The court said it was "admissible to explain an ambiguity, whether latent or patent."<sup>5</sup> So parol evidence was intended to show

<sup>1</sup> *Claremont v. Carlton*, 2 N. H. 369; S. C. 9 Am. Dec. 88.

<sup>2</sup> *Hall v. Benner*, 1 P. & Watts, 402; S. C. 21 Am. Dec. 394.

<sup>3</sup> *Young v. Lorain*, 11 Ill. 624; S. C. 52 Am. Dec. 463.

<sup>4</sup> *Davis v. Fuller*, 12 Vt. 178; S. C. 36 Am. Dec. 334.

<sup>5</sup> See also *Deery v. Cray*, 10 Wall. 263. *Hoar v. Goulding*, 116 Mass. 132. *Dunham v. Gannett*, 124 Mass. 151. *O'Farrel v. Harney*, 51 Cal. 125. *Maguire v. Baker*, 57 Ga. 109. *Beal v. Blair*, 33 Iowa, 318. *Kimball v. Brawnner*, 47 Mo. 398. *Wills v. Leverich*, 20 Oreg. 168. *Dorgan v. Weeks*, 86 Ala. 329.

what was intended by "the west half of lot 76," in a township.<sup>1</sup> And by "at or near a tree."<sup>2</sup> And by "Pelican Beach."<sup>3</sup> In *Kirkpatrick v. Brown*, 59 Ga. 450 (1877), parol evidence was admitted that in the terms "rights, members and appurtenances," the parties intended to include the joint use of an alley between two lots. In *Putnam v. Smith*, 4 Vt. 622, the case of a grant reserving "all freestone," parol evidence was admitted to show that the parties intended only loose stone on the surface of the land, and not a ledge afterward discovered. Where a deed conveys "all those parcels of land sold to" the grantor by a third person, who it appeared contracted to sell more than he conveyed, oral evidence was allowed to explain whether the deed conveyed what was described or only what was conveyed.<sup>4</sup> Parol evidence was admitted to show that the shape of a specified quantity of land, with the buildings thereon," excepted out of the corner of a tract conveyed, was not square.<sup>5</sup> Parol evidence was admitted in *Doolittle v. Blakesley*, 4 Day, 265; S. C. 4 Am. Dec. 218, to show that in "the farm on which he dwelt," the grantor did not include a separate, uninclosed, wild piece of land. "The term 'farm,' as to extent, is indefinite and ambiguous." And so to show the reasonable width of a right of way reserved in a deed and described as "about five feet in width."<sup>6</sup> Where a legal boundary between two towns differed from that generally recognized, and a deed described it in terms equally applicable to either, parol evidence was admitted to explain the ambiguity.<sup>7</sup> But in ejectment it was held inadmissible to show that perches were intended where degrees were mentioned.<sup>8</sup> Parol evidence is admissible to show that "mines and minerals" includes paintstone, but not to show that the parties intended only copper ore.<sup>9</sup>

8. Parol evidence was admitted to show that by "Brown" the grantor intended "Bowen" as the grantee.<sup>10</sup> So in *Houston v. Bryan*, 78 Ga. 181; S. C. 6 Am. St. Rep. 252, to show that by

<sup>1</sup> *Pettit v. Shepard*, 32 N. Y. 97.

<sup>2</sup> *Stewart v. Patrick*, 68 N. Y. 450.

<sup>3</sup> *Coleman v. Manhattan B. I. Co.*, 94 N. Y. 229.

<sup>4</sup> *Bradish v. Yocum*, 130 Ill. 386.

<sup>5</sup> *Lego v. Medley*, 79 Wis. 211; S. C. 24 Am. St. Rep. 706.

<sup>6</sup> *Atkins v. Bordman*, 2 Metc. 457; S. C. 37 Am. Rep. 100.

<sup>7</sup> *Putnam v. Bond*, 100 Mass. 58; S. C. 1 Am. Rep. 82.

<sup>8</sup> *Clarke v. Lancaster*, 36 Md. 196; S. C. 11 Am. Rep. 486.

<sup>9</sup> *Hartwell v. Camman*, 2 Stockt. Ch. 128; S. C. 64 Am. Dec. 448.

<sup>10</sup> *Bowen v. Slaughter*, 24 Geo. 338; S. C. 71 Am. Dec. 135.

"child," in a trust deed, the grantor intended a child by a former husband. So in *Lessee of Pillsbury v. Dugan's Admr.*, 9 Ohio, 117; S. C. 34 Am. Dec. 427, to show that "Pillsby" meant "Pillsbury," and that "David C." meant "David A."<sup>1</sup> So that "Eli Nicks," a grantor, was "Elias Nicks" named in a patent.<sup>2</sup> But in *Pitts v. Brown*, 49 Vt. 86; S. C. 24 Am. Rep. 114, in ejectment similar evidence was excluded to show that Rufus V. and Russel V. were the same grantor, and that the latter name was written in the deed by mistake, on the ground that the deed could not thus be reformed in a court of law. In *Begg v. Begg*, 56 Wis. 534, the court said: "Where the grantee in a deed of land has a name borne by two persons, parol evidence is admissible to show which person was intended. In *Thompson v. Jones*, 4 Wis. 106, where the deed described the premises as in the northwest quarter section, it was allowed to be proved by parol that the southeast quarter section was intended; or as in *Atwater v. Schenck*, 9 Wis. 160, where the county and state were omitted in the description of the land, it was allowed to be shown that the land imperfectly described and claimed was the land intended to be conveyed; or as in *Staak v. Sigelkow*, 12 Wis. 234, where the deed was made by the wrong baptismal or Christian name, it was allowed to show by parol who was the person intended; or as in *Schmitz v. Schmitz*, 19 Wis. 207, where in case of the division of a lot, the half intended to be set off to the party was shown by the fact of possession being taken at the time of the division, and by the parol agreement of the division; or as in *Sargeant v. Solberg*, 22 Wis. 132, where the mortgage was for wood piled on a certain lot by number, parol evidence was allowed to show the wood intended to be mortgaged; or as in *Bancroft v. Grover*, 23 Wis. 463, where in an arbitration award a certain note was described by the wrong name, evidence was allowed as to the person intended. See also *Harding v. Coburn*, 12 Metc. 333; *Milwaukee, etc., R. Co. v. Milwaukee, etc., R. Co.*, 20 Wis. 174." Where land was located under a bounty warrant issued to "William Heronymus," a single man, for military services in 1836, and plaintiffs claimed title to the same as the heirs of "William Hieronymus," evidence that the latter was a single man, who died about the year 1836, was held sufficient to estab-

<sup>1</sup> *McDuffie v. Clark*, 17 N. Y. St. Rep. 356.

<sup>2</sup> *Henderson v. Hackney*, 23 Ga. 383; S. C. 68 Am. Dec. 529.

lish *prima facie* the identity of their ancestor and the one to whom the certificate was issued.<sup>1</sup>

9. Parol evidence was admitted to show that the description of a mortgage, in an assumption clause in a deed, as executed by G. and wife, was intended for D. and wife.<sup>2</sup> The court said: "This is therefore a case where parol evidence may be given to apply the covenant to the subject-matter. There was no other mortgage of that date or amount. Indeed, this was the only mortgage upon the premises. The court could take proof of the surrounding circumstances for the purpose of applying the covenant to the mortgage actually intended, and a reformation of the contract was not needful."

10. Evidence is inadmissible to prove that the grantee named is not the one intended by the grantor.<sup>3</sup> In the case of a deed to a specified person "and her heirs," parol evidence is incompetent to show for what purpose and to whom the deed was intended to pass title.<sup>4</sup> In the fifteenth edition of Greenleaf on Evidence, in a note to sec. 290, it is said: "The case of *Kingsford v. Hood*, 105 Mass. 495, decides that when it is proved that two people, father and son, bear the same name, which is the name of a grantee in a deed, declarations of the grantor made at the time the deed is drawn up, as to which of the two he intended should be the grantee, are inadmissible. This case proceeded upon the principle that the father having contracted for the land and paid the price, the intent of the grantor was immaterial, as the deed would pass the land to the father, and if it inured to the benefit of the son it must be by the intent of the *father*, not the grantor. It is submitted however that the intent of the grantor was the precise point in issue. If he intended the deed to be to the father, the land passed to the father; if he intended the deed to be to the son, then the land passed to the son, subject, it may be, if the father paid the price, to a trust in favor of the father." But the court held that evidence was competent that the deed was delivered to one of the two, and that he entered into occupation, and so of any declarations or acts forming part of the *res gestæ*. The same court held in *Simpson v. Dix*, 131 Mass. 179, that if

<sup>1</sup> *Tevis v. Collier*, — Tex. —; 19 S. W. Rep. 801.

<sup>2</sup> *N. Y. Life Ins. Co. v. Aitkin*, 125 N. Y. 660.

<sup>3</sup> *Whitmore v. Learned*, 70 Me. 276.

*Crawford v. Spencer*, 8 Cush. 418.

*Jackson v. Hart*, 12 Johns. 77.

*Jackson v. Foster*, 12 Johns. 488.

<sup>4</sup> *Prichard v. James*, — Ky. —; 20 S. W. Rep. 216.

land is conveyed to J. S., and there are two of that name, father and son, there is no presumption that the father was intended, nor that the omission of "junior" draws a presumption that the son intended the father to be the grantee; and that evidence is admissible to show who is the grantee.

11. On a lease of the "Adams House," parol evidence was held competent to show that it was the intention of the parties to include only that part of the building fitted up as a hotel under that name, and not the separate shops below.<sup>1</sup> A lease described the demised premises as "the premises on the corner of A and B streets, recently occupied by J. S. The shops are not included." *Held*, that the lease did not necessarily pass the entire building on the corner, except the shops; and that therefore parol evidence was admissible to show whether a particular part had been occupied by J. S.<sup>2</sup>

12. A contract of sale of a tract of land "called Mount Hope, containing about 40 acres," may be shown by the acts of the parties to intend 70 acres known by that name.<sup>3</sup> In *Case v. Dexter*, 106 N. Y. 548, where a deed conveyed "lot number three, lying southerly or southeasterly of Fish Lake, commonly known as Fish Lake lot, supposed to contain sixty-seven acres," and the *locus in quo* was seven acres north of the lake, and it was apparent that the deed did not cover the seven acres and that "number three" was a mistake, evidence brought to show that the land south of the lake was commonly known as Fish Lake lot was held competent.

13. Where land is conveyed by courses and distances alone, without reference to monuments, parol evidence to show that the true boundary is a line of marked trees, and varying from the written calls of courses and distances, is inadmissible.<sup>4</sup>

14. But in *McNeil v. Dixon*, 1 A. K. Marsh. 365; S. C. 10 Am. Dec. 740, it was said: "Parol evidence in relation to the boundaries of the land, or to the place of executing the survey, although not comprehended by the courses, but answering other description contained in the patent, was correctly admitted," and in *Francis v. Hazlerig*, 1 A. K. Marsh. 93, it was held that parol

<sup>1</sup> *Sargent v. Adams*, 3 Gray, 72; S. C. 63 Am. Dec. 718.

<sup>2</sup> *Alger v. Kennedy* (49 Vt. 109), 24 Am. Rep. 117.

<sup>3</sup> *Old Colony R. Corp. v. Evans*, 6 Gray, 25; S. C. 66 Am. Dec. 394.

<sup>4</sup> *Wynne v. Alexander*, 7 Ired. L. 237; S. C. 47 Am. Dec. 326.

To this effect, *Hamilton v. Cawood*, 3 Harr. & McH. 437; S. C. 1 Am. Dec. 378.



evidence may be given to show the real boundaries of land to be variant from those called for in a patent or deed.

15. In *Livingston v. Ten Broeck*, 16 Johns. 14; S. C. 8 Am. Dec. 287, where a deed granted a privilege of taking from other lands of the grantor "timber for building," evidence was admitted of an ancient and well-known custom under the grant to cut timber for fencing.

16. In *Blaney v. Rice*, 20 Pick. 62, the deed described the premises as running back from a street eighty-five feet, more or less, to other land of the grantor, part of the same tract. Evidence was admitted that the grantor, afterward, but before selling any more, put on record a plan of the land, in which the granted part was laid down as eighty-eight feet in depth from the street, and this was held to prevail, on the ground that it was equivalent to fixing a monument intimated by the words "more or less," and was presumed to be "done by agreement and in pursuance of the contract of sale." To the same effect, *Miles v. Barrows*, 122 Mass. 579. There it was said: "Upon applying the deeds to the land, a latent ambiguity arises, and it is competent to show by parol that the fences were erected by agreement of the parties, and were intended to mark the monuments and boundaries of the lots conveyed." In this case fences were alluded to in the deed as to be erected.

17. Parol evidence is inadmissible to show that by the words "more or less" the parties intended anything else than the sale of the entire tract described.<sup>1</sup> Or that in "mines and minerals" the grantor intended only copper ore.<sup>2</sup>

18. In *Frey v. Drahos*, 6 Neb. 1; S. C. 29 Am. Rep. 353, property was described in a chattel mortgage as "one frame grain elevator warehouse \* \* \* with all the appurtenances thereto belonging." Fifty feet distant were an engine-house, containing an engine and boiler, connected by a rubber belt with the elevator when in operation. One hundred feet distant were an office building and a stationary scale, entirely disconnected from the elevator, and used also in other business. The buildings were all on leased ground. *Held*, that the mortgage being unambiguous, parol evidence was inadmissible to show what was intended to be conveyed, and the opinion of witnesses as to what is "appurtenant" is incompetent. So in *Green v. Collins*, 86 N. Y. 246;

<sup>1</sup> *Dale v. Smith*, 1 Del. Ch. 1; S. C. 12 Am. Dec. 64.

<sup>2</sup> *Hartwell v. Camman*, 2 Stockt. Ch. 128; S. C. 64 Am. Dec. 448.

S. C. 40 Am. Rep. 531, the same was held in respect to a sewer-pipe discharging on adjacent premises of a third person. The court said: "As the deed merged all prior and contemporaneous agreements which had been made, the parol evidence was inadmissible for the purpose of controlling its legal effect, or modifying or enlarging its meaning or import. It was not sufficient to convey the right to the use of the sewer upon its face, and the effect of the testimony was to contradict and control its operation, and to give it more force than legitimately could be derived from the language used, and the apparent intention of the parties. Such evidence was incompetent for any purpose (*Mott v. Palmer*, 1 N. Y. 564) and even if received without objection, could not change the legitimate effect of the deed. The case presented bears no analogy to one where a description of land conveyed by deed is vague and uncertain, and parol evidence is admissible as to the real boundaries to identify the subject-matter, and to show what the grantor intended by a general designation of a particular portion. *Pettit v. Shepard*, 32 N. Y. 97." In *Farr v. Nichols*, 132 N. Y. 327, a mortgage having been executed as security for paper "indorsed" by the mortgage, parol evidence was admitted to show whether the word was used solely in reference to indorsements then existing, or was meant also to cover future indorsements. Citing *Bank v. Strever*, 18 N. Y. 502; *Simons v. Bank*, 93 N. Y. 269; *Bank v. Hall*, 83 N. Y. 338.

## **Sec. 99. Boundaries—declarations of former owner.**

Parol declarations and admissions of one deceased, while in possession of land, claiming ownership, as to the true boundary, are admissible if made while pointing out the boundary.<sup>1</sup>

But declarations of a deceased owner of land as to the lines of his ownership are inadmissible when favorable to his interest.<sup>2</sup>

<sup>1</sup> *Jackson v. McCall*, 10 Johns. 377; S. C. 6 Am. Dec. 343.

*Deming v. Carrington*, 12 Conn. 1; S. C. 30 Am. Dec. 591.

*Pike v. Hayes*, 14 N. H. 19; S. C. 40 Am. Dec. 171.

*Chapman v. Twitchell*, 37 Me. 59; S. C. 58 Am. Dec. 773.

*Armstrong v. Risteau*, 5 Md. 256; S. C. 59 Am. Dec. 115.

*Whitney v. Bacon*, 9 Gray, 206; S. C. 69 Am. Dec. 281.

*Wood v. Willard*, 36 Vt. 82; S. C. 84 Am. Dec. 659.

*Wood v. Foster*, 8 Allen, 24; S. C. 85 Am. Dec. 681.

*Hooten v. Comerford*, 152 Mass. 591; S. C. 23 Am. St. Rep. 861.

<sup>2</sup> *Corbleys v. Ripley*, 22 W. Va. 154; S. C. 46 Am. Rep. 502, and cases there cited.

**Sec. 100. Boundaries—reputation.**

The boundaries of a private estate, when in doubt by the deeds, may be proved by reputation, and by the declarations of disinterested persons made before legal controversy had arisen.<sup>1</sup>

"If no certain monuments can be found, nor any data to determine courses and distances, a lesser degree of testimony may be resorted to; and long-continued occupancy and acquiescence, even reputation and hearsay as to boundaries, may have weight."<sup>2</sup> "That boundaries may be proved by hearsay testimony is a rule well settled."<sup>3</sup> In *Sasser v. Herring*, 3 Dev. L. 340, Henderson, C. J., after declaring such evidence competent, upon authority, says: "And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident *termini* of our lands, would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have in this instance sacrificed the principles upon which the rules of evidence are founded."

In *Tucker v. Smith*, 68 Tex. 473, the court say: "It is well settled by our decisions that the declarations of disinterested parties, since deceased, who were in a position to know a boundary line, are admissible in a controversy about such line." But it appeared that the statements were made while the declarant was pointing out posts placed by the surveyor who ran the disputed line. But in *Hurt v. Evans*, 49 Tex. 311, it was held, without

<sup>1</sup> *Whitehurst v. Pettipher*, 87 N. C. 179;

S. C. 42 Am. Rep. 520.

*Smith v. Headrick*, 93 N. C. 210.

*Bethea v. Byrd*, 95 N. C. 309; S. C. 59 Am. Rep. 240.

*Kinney v. Farnsworth*, 17 Conn. 355.

*Nieman v. Ward*, 1 W. & S. 68.

*McCausland v. Fleming*, 63 Penn. St. 36.

*Sasser v. Herring*, 3 Dev. L. 340.

*Beard v. Talbot*, 1 Cooke (Tenn.), 142.

*Smith v. Nowells*, 2 Litt. 159.

*Great Falls Co. v. Worster*, 15 N. H. 412.

*Martin v. Atkinson*, 7 Ga. 228; S. C. 50 Am. Dec. 403.

*Wood v. Willard*, 37 Vt. 386.

*George v. Thomas*, 16 Tex. 74; S. C. 67 Am. Dec. 612.

*Ralston v. Miller*, 3 Rand. 44; S. C. 15 Am. Dec. 704.

*Davis v. Fuller*, 12 Vt. 178; S. C. 36 Am. Dec. 334.

*Nixon v. Porter*, 34 Miss. 697; S. C. 69 Am. Dec. 408.

*Gibson v. Poor*, 21 N. H. 440; S. C. 53 Am. Dec. 216.

*Sexton v. Hollis*, 26 S. C. 236.

<sup>2</sup> *Nys v. Biemeret*, 44 Wis. 104.

<sup>3</sup> By *McLean, J.*, *Boardman v. Lessees of Reed*, 6 Pet. 328.

discussion, that declarations after suit, by a party never interested in the lands, are not competent to prove boundaries. In *Stroud v. Springfield*, 28 Tex. 649, the court said: "Evidence of this character, except where it was a part of the original *res gestæ*, was not admissible at common law to prove the boundaries of a private estate. Its admission was restricted to cases involving questions of a general or public nature. The admissibility of this character of evidence seems to have turned upon the nature of the reputed fact, whether it were of interest to one party only or to many. If the latter, it was admissible, if the former, it was excluded. The tendency of American decisions has been to break in upon the rule of the common law, in reference to questions of private boundary, and to remove the restrictions which exclude evidence of this character in such cases. This has been the result of necessity. Our landmarks are usually of perishable materials, and by the settlement and improvement of the country, and from other causes, they are constantly being destroyed. It is therefore indispensable in many cases that hearsay or reputation should be received to establish old boundaries. \* \* \* There is a strong array of authorities which seem to support the common-law rule. But the courts of a majority of the States, it is believed, hold the same doctrine asserted in the cases I have cited from North and South Carolina. *Sample v. Robb*, 16 Pa. St. 305; *Sasser v. Herring*, 3 Dev. L. 340. \* \* \* The rule that old boundaries may be proved by the common reputation and understanding of the neighborhood where the land lies, would seem better established, and to stand in principle on higher ground than the one we have been considering, which admits the declarations of deceased persons of competent knowledge and having no interest as evidence. The admission of evidence of common reputation as to old boundaries, which frequently cannot possibly be proved by positive testimony, is based on the extreme probability of the truth of a fact received, assented to and acted on as true, by the common consent of a community having peculiar means for correct information, and no interest to warp their judgment in forming a correct conclusion. In the absence of positive and direct testimony, which when they are ancient cannot usually be had to establish boundaries, common reputation is perhaps as little liable to error as any other species of evidence that can be resorted to for the purpose, and indeed is frequently the only resort. The general rule is undoubted, that common reputation is admissible as evi-

dence in questions of boundary, but there is much diversity of opinion as to its proper application. *Boardman v. Lessees of Reed*, 6 Pet. 341. The unrestricted admission of this species of evidence would be fraught with the most dangerous tendencies, and violative of the best dictates of experience. The admissibility, as well as the value and weight of general reputation, must from its nature depend very much upon the circumstances of the case in which it is offered. It cannot of course be received as to title. It is admissible only as to the *locus in quo* of the boundary, a fact of which the community or neighborhood around it is supposed to be peculiarly well informed. The boundary must be an ancient one, and its supposed locality must be of sufficient interest or note in the neighborhood or community to have been the subject of observation and conversation among the people. The reputation or understanding must be general and concurrent. There, weight of opinion or neighborhood report is not common reputation. The reputation or understanding must have been formed and in existence before the controversy commenced in which it is used as evidence. Men are not presumed to be indifferent in regard to matters in actual controversy, for when the contest has begun, people generally take one side or the other, and if they are disposed to speak the truth, facts are or may be seen by them through a false medium. For this reason, it is necessary that proof of common reputation must have reference to a time *ante litem motam*."

This is the most extended and the most excellent consideration of this question on principle.

*Contrary authority:* Greenleaf and Wharton lay down a contrary rule. Greenleaf says (1 Ev., § 145): "By the weight of authority and upon better reason such evidence is held to be inadmissible for the purpose of proving the boundary of a private estate," etc. Wharton (Ev., § 191) says: "Such declarations should only be received when made coincidentally with pointing out boundaries, and by parties either performing business duties at the time or having no interest to subserve in making the declarations." Wharton essays rather fancifully to reconcile the conflict of decision between this country and England, on the ground that "our boundaries go back, in the main, to proprietary or government grants or to purchase from the Indians," the interior as well as the exterior boundaries of which are shifting or imperfectly described, and in regard to which "the community

took such an interest as made its common opinion of value as exhibiting not merely what the parties understood the boundaries to be, but what they really made the boundaries," and hence the reputation relates to matters of public interest.

This is also the doctrine of Maine, Massachusetts and New Jersey. In *Long v. Colton*, 116 Mass. 414, the court said: "In *Bartlett v. Emerson*, 7 Gray, 174, it is held that to be admissible such declarations must have been made by persons now deceased, while in possession of land owned by them and in the act of pointing out their boundaries, and when it appears to show an interest to deceive or misrepresent. The declarations offered and rejected at the trial do not come within the exception thus defined to the rule by which hearsay is excluded. The decisive objection to their competency is that they do not appear to have been made while in the act of pointing out the boundaries of the declarant's land. This is an element which cannot be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it accompanies an act which it qualifies or gives character to. The declaration does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible; and in the cases from New Hampshire, cited by the defendant, it seems to be held that declarations of deceased persons, who from their situation appear to have had the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land. *Smith v. Forrest*, 49 N. H. 230, 237; *Great Falls Co. v. Worster*, 15 N. H. 412, 437. But by the current of authority, and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or *quasi* public nature. 1 Greenl. Ev., § 145; 1 Phil. Ev. (N. Y. ed. 1849) 241, 242; Cowen & Hill's Notes; *Hall v. Mayo*, 97 Mass. 416."

This case is cited and followed in the Supreme Court of New Jersey, in *Curtis v. Aaronson*, 49 N. J. L. 68; S. C. 60 Am. Rep. 584. The court there said: "In some of the American States the rule excluding hearsay testimony is, in this line of fact, to some extent departed from, and traditionary evidence is received to establish private boundary. It has been permitted, under color of making proof by ancient reputation, to give the declara-

tions of third persons, strangers to the title, made when not engaged in any provable act, such declarations being recitals of past acts and doings of the declarant, or expression of opinion on matters exclusively pertaining to the rights of others. The reception of such evidence is confessedly in derogation of the established rules of evidence under our system, and is justified only on the ground of an alleged necessity. It is needless to cite these cases, as they are fully referred to in the text-books in common use. But the decided weight of authority in the country, and upon the solid ground of reason and principle, is against the admissibility of evidence of this character. The cases decided in the courts of Massachusetts illustrate and enforce what is believed to be the true rule. There traditionary proof is received in matters of private lines only when the boundary in question is a public or *quasi* public one, with which the private right is coincident.

“Proof of declarations of persons since deceased, in respect to private boundaries, to be admissible in evidence, must have been made by a declarant in possession as owner at the time, and while engaged in pointing out the boundary in question, and such declarations need not be against interest or in disparagement of title; they are received when nothing appears to show an interest to deceive or misrepresent.” Citing the Massachusetts cases.

“The rule in Massachusetts is approved in the Federal courts. *Hunnicut v. Peyton*, 102 U. S. 333, 363.”

“In such cases, recitals of fact not made by one in possession as owner and qualifying such possession, not made by an owner against interest, not made by one in the performance under proper authority of some provable act in respect to such boundary, and qualifying and characterizing such act, but being the mere voluntary statement of a stranger, not under oath or in presence of parties, cannot, under any rule or reason of safety, be regarded as competent testimony upon which to determine private title to lands, and whether made *ante* or *post litem motam*, are equally objectionable and illegal; and while the courts of some States have, as it would seem, been willing to receive such testimony, in this State we have not gone so far.” To the same effect is *Chapman v. Twitchell*, 37 Me. 59; S. C. 58 Am. Dec. 773.

**Sec. 101. Boundaries—practical location—acquiescence.**

The law on the subject of practical location of division lines seems to have been earlier and more carefully examined in the New York decisions than in any other State. As the subject is one of great practical importance a review of those decisions may be useful. The subject is naturally divisible into the heads of Acquiescence and Agreement. Under the former head the following proposition is deducible from the authorities :

Where the description of the premises in a deed is definite, certain and unambiguous, no extrinsic evidence is admissible to show acquiescence in a different location, unless a possession be shown under claim of title for such a length of time as to bar a recovery in ejectment. If however the description is vague, obscure or ambiguous, or the monuments referred to have become decayed or destroyed, such evidence is admissible in aid of the deed.

1. In the earliest case in New York, *Jackson v. Bowen*, 1 Caines, 363, A. D. 1803, it was decided that an adverse possession of more than twenty years was a bar to a recovery in ejectment. The court remarked that if a man was mistaken in respect to his title, but under circumstances showing no suspicion of imposition or ignorance acquiesced in a possession by another in hostility to it, for the length of time shown in this case, he ought to be concluded. The length of time in this case was thirty-six years.

2. In *Jackson v. Dysling*, 2 Caines, 198, A. D. 1804, the plaintiff's lessor and the defendant's predecessor had forty years before employed two surveyors to run a line between them, and the defendant's predecessor by parol agreed to remove his fence to the line which the surveyors found, but there was evidence of a subsequent parol agreement between the plaintiff's lessor and the defendant, in effect rescinding that agreement. This second agreement was, that if a suit between Klock, defendant's predecessor, and Wills should be decided in favor of Klock, the defendant was to give up possession without suit ; but if Wills prevailed, the plaintiff's lessor was to abandon his claim. No evidence as to the event of that suit was given. Judge Spencer thought the first parol agreement binding, but held it rescinded by the second ;



that the plaintiff was bound to show the result of that suit; but he held the acquiescence of forty years to be conclusive in favor of the defendant. Judge Livingston held the first agreement invalid, because it was not acted on, but agreed with Spencer as to the acquiescence. Judge Thompson held the first agreement not affected by the statute; that the second agreement had nothing to do with the case as it stood, or that the defendant should have chosen the result of the suit; and that the plaintiff was entitled to recover. Judgment of nonsuit.

3. In *Jackson v. Vedder*, 3 Johns. 8, A. D. 1808, it was held that where a partition had been made, with a survey and a map, and possession had been taken accordingly and held for forty years, the parties were concluded from contesting the correctness of the actual location.

4. In *Jackson v. Dieffendorf*, 3 Johns. 269, A. D. 1808, it was held that where a location had been made under a deed and survey, and undisturbed possession held accordingly for thirty-eight years, it should prevail, although subsequently made to appear inaccurate.

5. In *Jackson v. Ogden*, 7 Johns. 238, A. D. 1810, the grant was uncertain and ambiguous as to location, but there had been an acquiescence of seventeen or eighteen years, during which the land had been cultivated and become valuable. The plaintiff also had purchased under defendant's title, taking a deed recognizing the lines thus located. A majority of the court held this to be conclusive. But Judge Van Ness dissented, holding that the grants conferred no title on the defendant, and that such a length of possession was not sufficient to make title. He says: "The extent which we have hitherto gone is, that when two persons already having a title have settled the line of division between them, or when one having title has made an actual location, according to what he supposed to be his true line, and his neighbors have acquiesced in such location for a considerable length of time, the boundary thus established shall remain undisturbed. But in this case my brethren go greatly beyond the principle of our former decisions."

6. In *Jackson v. Douglas*, 8 Johns. 367, A. D. 1811, where there was no uncertainty as to the true location of two adjoining lots of land, the single fact that one of the plaintiff's lessors, eight years before, had pointed out a mistaken line, which was fenced accordingly, was not sufficient to conclude the plaintiff.

7. In *Jackson v. Gardner*, 8 Johns. 394, A. D. 1811, it was held, that where A. voluntarily surrendered a lease and took a new lease, and afterwards claimed under the old lease, he could recover no more land than what he could prove with absolute certainty was covered by the old lease; especially after the premises claimed had been for sixteen years in possession of another, who had made valuable improvements.

8. In *Stuyvesant v. Tompkins*, 9 Johns. 61, A. D. 1812, there was a crooked fence between the parties, which the plaintiff proposed to the defendant to straighten. Accordingly the plaintiff employed a surveyor, who, to the knowledge of the defendant, and without objection on his part, ran a straight line. The plaintiff removed the fence to this line, and the defendant pulled it down. The plaintiff brought trespass. The defendant showed that he and his ancestors had been possessed of the *locus in quo* for more than twenty-five years, and that during all that time the crooked fence had been the boundary. Also that before the plaintiff's removal of the fence he objected to it. The plaintiff was defeated.

9. In *Jackson v. Smith*, 9 Johns. 100, A. D. 1812, it was held that where a survey was made by the direction and under the observation of the grantee, he cannot, after the lapse of twenty-six years, vary the location. The grant in question was "for the use of the gospel," but the court do not seem to lay any stress on the peculiar sacredness of the purpose.

10. In *Jackson v. McCall*, 10 Johns. 377, A. D. 1813, it was proved that the immediate predecessor of the lessor of the plaintiff had repeatedly confessed that he was present when the line was run by the king's surveyors, and that the line set up by the defendant was the one he referred to. This line had been recognized on both sides for forty-one years. *Held*, conclusive against the plaintiff.

11. In *Jackson v. Van Corlaer*, 11 Johns. 127, A. D. 1814, the parties had made a new survey, and *agreed on* the line run thereon as the true boundary. Positive acts of acquiescence were shown, and after nineteen years the line thus established was held conclusive. But this was expressly placed on the ground of the agreement.

12. In *Jackson v. Freer*, 17 Johns. 29, A. D. 1819, the proprietors of the patent had partitioned the same by actual survey, and the lot in question had been improved more than twenty years,

and the defendant had possessed it fourteen years. A verdict for defendant was sustained. The decision was placed on the ground of the original agreement.

13. In *Rockwell v. Adams*, 7 Cow. 761, A. D. 1827, action of replevin, tried in 1825, it does not appear how long the acquiescence had been. The lands were wild, and no occupation was shown except cutting of timber, and there had been no agreement as to the line. But the court held that where the line has been acquiesced in for a great number of years by all the parties interested, it is conclusive evidence of an agreement to that line; citing *Jackson v. Bowen*, *Jackson v. Vedder* and *Jackson v. Dieffendorf*, and adding: "In each of these cases erroneous locations had been made, and they had been acquiesced in (not with a full knowledge that they were erroneous, but under a belief that they were correct), for from thirty to forty years." The court also hold that an actual practical location will control, although the party does not know that its effect will be to give him less land than he would otherwise be entitled to, and that there need be no express agreement to abide by the line. And the court then adopt and sanction Van Ness' dissenting opinion in *Jackson v. Ogden* as the true rule. The verdict for defendant was set aside. The action was tried again in 1828 (6 Wend. 467, A. D. 1821) and eleven years' acquiescence was shown. The plaintiff had a verdict. Chief Justice Savage said the question was the same as in 7 Cowen, adopted the law there laid down, and denied a new trial. From this decision error was brought, and the case came up again in 1836, before the Court of Errors (16 Wend. 285), and this is the starting-point back to which all subsequent decisions go. Chancellor Walworth laid down this rule: "Where there can be no real doubt as to how the premises should be located, according to certain and known boundaries described in the deed to establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be either a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations in relation to real estate; or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof; or the party whose right is to be thus barred must have silently looked on and seen the other party doing acts, or subjecting himself to expenses, in relation to the land on the opposite side of the line, which would be

an injury to him, and which he would not have done if the line had not been so located, in which case, *perhaps*, a grant might be presumed *within* the twenty years." Senator Maisou in a long and elaborate opinion reviews all the cases, and concludes that possession for less than twenty years had never been held a bar, except in three cases, namely: Ogden, Van Corlaer and Gardner. He lays down the rule "that where the boundaries in the deed are clear and unambiguous, and the land thereby described can be easily, and without doubt or conjecture, ascertained, no acquiescence or recognition, however unequivocal or often repeated, can have the effect of depriving the party of his possession of land, unless that acquiescence be continued in for at least twenty years." He continues: "When lands have been located, and such location acquiesced in for any time less than twenty years, either with or without agreement, and during the continuance of such acquiescence, with the knowledge and assent of the party, but without objection, buildings are erected and improvements made on the land thus possessed, the owner of the fee will nevertheless at law, be entitled to recover his land, but the party building or improving is not remediless; full and perfect relief and protection is afforded him in chancery," namely, by a perpetual injunction against the action at law. A new trial was granted with but one dissenting voice.

14. Intermediate 6th Wendell and 16th Wendell, the case of McCormick v. Barnum, 10 Wend. 104, was decided in 1833. Here it was held that an owner of land was bound by a division line, recognized by his surveyor as correct, where the owner has given deeds in conformity to a map and field book made by the surveyor, and no efficient attempt is made for twenty-two years to correct the line. Also Kip v. Norton, 12 Wend. 127, in 1834, in which mere acquiescence for five years was held inconclusive. Also Dibble v. Rogers, 13 Wend. 536, in 1835, in which the court held an acquiescence of twenty years conclusive.

15. Clark v. Wethey, 19 Wend. 320 A. D. 1838, decided that where in a description in a deed, course, distance and monument are given, the premises must be located according to the deed, and all parol evidence of the intent, acts and declarations of the parties, going to establish a different location, is inadmissible as contradicting or varying the deed, unless a possession be shown under claim of title for such a length of time as will bar a recovery in an action of ejectment. If however doubt or

uncertainty exist, owing to the vagueness or obscurity of the description, or the decay or destruction of the monument, such evidence is admissible in aid of the deed. An actual location by *agreement* different from the deed will be obligatory. Judge Cowen says the defense of title by acquiescence for less than the statutory period is in the face of the statute of frauds, and also contravenes the doctrine of parol evidence. It would seem at first sight that Judge Cowen does not exactly know what to do with Adams and Rockwell, nor fully understand on what ground the reversal was there put, but inasmuch as the Supreme Court *were* reversed, he himself has no compunctions about "going back" on the doctrine overruled. On a closer examination I do not see that his doctrine differs from that of the court above.

16. The doctrine of "oral conveyance" seems to have been "laid," perhaps stunned, by Judge Cowen's tremendous and unanswerable onslaught, until 1853, when it "walked" again in Clark v. Baird, 9 N. Y. 183. This case decided, that where a grantor at the time of the execution of the deed put the purchaser in possession, and pointed out the boundaries, but the boundaries so pointed out embraced land not included in the deed, occupation with the consent of the grantor for a less period than that required by statute to bar a right of entry gave the purchaser no title to the lands not covered by the deed. Judge Cowen's doctrine is expressly sustained.

17. Down to this time the conclusiveness of acquiescence had been based upon the notion that it was evidence of a parol *agreement* establishing the line. But this idea was denied in 1857, in Baldwin v. Brown, 16 N. Y. 359, which put the doctrine on the true ground, namely, that the acquiescence is conclusive evidence that the location is correct. It became material to decide this in answer to the argument that where the location was erroneous no bar could be inferred, because an agreement founded on a mutual mistake of facts is not obligatory. But the remark that "there may be cases in which an express agreement recognizing an erroneous boundary will conclude a party; as where the other party, acting upon the faith of such agreement, has made expensive improvements, the benefit of which will be lost to him if the line is disturbed," seems *obiter*. Acquiescence of more than forty years was shown in this case, and the court say: "The plaintiff is precluded, on principles of public policy, from setting up or insisting upon a line in opposition to one that has been steadily

adhered to, upon both sides, for more than forty years." Judge Cowen's doctrine was also approved in *Terry v. Chandler*, 16 N. Y. 358, A. D. 1857.

In *Reed v. Farr*, 35 N. Y. 113, A. D. 1866, which was a case of practical location and acquiescence for more than twenty years, the case of *Baldwin v. Brown* was followed and approved, and its reasoning adopted. See also *Jones v. Smith*, 64 N. Y. 180; *Stewart v. Patrick*, 68 id. 450.

19. In the same year the question was reviewed in a learned and exhaustive opinion, in *Hubbell v. McCulloch*, 47 Barb. 287. The plaintiff alone, more than twenty years before, ran an erroneous line through woods, on uncultivated and unimproved lands, having previously been told by the defendant that the defendant would abide by the line as he should find it, and having subsequently described it as run to the defendant, but the defendant not having assented to it, and it not being fixed or adopted. There being no adverse holding proved, this was held not to amount to a practical location, because there was no original agreement of minds, and no subsequent acquiescence except silence. The court say: "There has been in the early cases a good deal of confounding of possessions that began adversely, with this new method of getting round the statute of frauds, now called 'practical location'; but it is time that possession begun adversely and possession claimed to have begun under practical location, if there is any difference, should be in some way distinguished." The court find the origin of "practical location" in an acquiescence between the parties in a line known and understood by them, of such a length of time as to be identical with "time immemorial," or "time out of memory." "Rather than disturb such an ancient line, it was the policy of the law to presume a grant."

20. In *Reed v. McCourt*, 41 N. Y. 441, A. D. 1869, it was held that a parol assent as to the location of a boundary fence, and the actual erection of the fence, followed by mutual occupation and acquiescence for a few months, is not sufficient to change the true line, and that "scarcely less than twenty years" would effect such change.<sup>1</sup>

<sup>1</sup> See also *French v. Pearce*, 8 Conn. 439; S. C. 21 Am. Dec. 680.

*Kip v. Norton*, 12 Wend. 127; S. C. 27 Am. Dec. 120.

*Beecher v. Parmele*, 9 Vt. 352; S. C. 31 Am. Dec. 633.

*Jackson v. McConnell*, 19 Wehd. 175; S. C. 32 Am. Dec. 439.

## Sec. 102. Boundaries—agreement.

Under the head of agreement the following may be laid down as the correct rule:

A parol agreement between adjacent owners of land to fix a disputed division line, is valid and binding by way of estoppel in those cases where the grant is so indefinite, uncertain, or ambiguous that the true line is not ascertainable therefrom, but in no other.

As we have seen, a majority of the court in *Jackson v. Dysling* thought that a parol agreement to abide by a certain division line would be sufficient to prevent either party from claiming an ejectment, though it would not pass the lands. But this was an agreement that had been recognized for forty years.

1. *Sellick v. Addams*, 15 Johns. 197, was an action of trespass for cutting timber. There had been a general submission by bond seven years before, of all controversies and demands, and under this the arbitrators had fixed a boundary line. This, the court said, would have enabled the defendant to maintain ejectment, and justify the trespass.

2. *Shepard v. Ryers*, 15 Johns. 497, was assumpsit to recover damages for breach of an agreement under seal, by which the plaintiff and defendant appointed certain persons to partition certain lands between the parties. The defendant had refused to abide by the award. It was held that the plaintiff was not entitled to recover any part of the consideration in a deed of the premises which he had executed, his grantee never having been evicted, and his liability being merely contingent; and they further remark, "the partition made by the persons appointed for that purpose might be considered in the nature of an award of arbitrators, which, though it might not have the operation of conveying the land, might estop the defendant."

3. In *Jackson v. Gager*, 5 Cow. 383, an action of ejectment, the question was of location. This depended on a submission of the boundaries to arbitration by R. H., deceased, as attorney. It

*Crowell v. Bebee*, 10 Vt. 33; S. C. 33  
Am. Dec. 172.

*Riley v. Griffin*, 16 Ga. 141; S. C. 60  
Am. Dec. 726.

*Pickett v. Nelson*, 71 Wis. 542.

*Russell v. Maloney*, 39 Vt. 579; S. C.  
94 Am. 358.

*Burris v. Fitch*, 76 Cal. 395.

*Galbraith v. Lunsford*, 87 Tenn. 89.

*Hinkley v. Crouse*, 125 N. Y. 730.

was undertaken to prove the execution of the power of attorney, and the court also admitted proof of a parol submission under it, and of a parol award. On review, the court held the power not properly proved, and granted a new trial for that reason. Then the court remarked, "without however intending to express a definitive opinion upon the subject, that the submission and award, though relating to real estate and by parol, were valid, and not within the provisions of the statute of frauds," and continued so to remark for a page and a half, citing *Jackson v. Dysling*.

4. In *Robertson v. M'Niel*, 12 Wend. 578, tried in 1831, there was a submission in writing, not under seal, in 1830, to arbitrators concerning a division line, and a written award. This was held conclusive on the ground of estoppel. The cases relied on were those above cited. This seems to be the first decision necessarily involving the question.

5. *Davis v. Townsend*, 10 Barb. 333, tried in 1850, was an action of trespass, involving a division line and fence between two farms, which had stood for thirty years. The plaintiff showed title to the *locus in quo*, but the defendant showed an oral consent on the part of the plaintiff, that the fence might be straightened, in pursuance of which defendant, about six years before, moved the fence eighteen inches over upon the plaintiff's inclosure. For that act this action was brought. It was proved that the plaintiff objected pending the removal, and no consideration was paid. Verdict for defendant. On review, the court say: "It has been repeatedly held that a parol agreement to ascertain and establish a boundary line between the owners of adjoining lands, which *is in dispute and in some degree unknown and undefined*, either directly by the parties themselves, or through the submission to an award of others, is not an agreement which extends to the title, and therefore not within the provisions of the statute of frauds." "But where the line is already well known and established; where it has been recognized and acquiesced in by the adjoining owners; and more especially where it is indicated and marked out by fences or other permanent monuments to which they have claimed and occupied for a sufficient length of time to bar an entry, a parol agreement to change it differs entirely in its effect from that to which I have before referred, and does extend to the title." A new trial was granted.

6. *Vosburgh v. Teator*, 32 N. Y. 561, was an action of tres-



pass involving a disputed division line. The plaintiff produced evidence that he and his predecessors had possessed the *locus in quo* more than twenty years, but the paper title was not given. The defendant gave evidence tending to show that the true line was elsewhere, and that the plaintiff's occupation was by special permission. It was also shown that the line was in dispute in 1846, and that then, as defendant claimed, an agreement was orally made that a surveyor should run and fix the line, and that the parties should abide by it, and put the fence on it. The plaintiff claimed that it was only one end of the line that was in dispute. The surveyor did run and fix the line, but it was a disputed question of fact whether he ran the whole line or not. The new line took some land in one place from the defendant, which the plaintiff availed himself of. In another place the line so run would deprive the plaintiff of land, and this he objected to, and when the defendant commenced, three years after, to move his fence to the new line, plaintiff brought this action. There was a verdict for plaintiff. The court held that it is the policy of the law to permit parties to settle and adjust doubtful, uncertain and disputed facts between themselves, and when so settled upon a good consideration, not to permit them afterward to be brought into dispute. That a disputed indefinite or uncertain boundary line between adjoining proprietors may be fixed by parol or arbitrament. But an agreement by parol to establish a new line, where the boundary is not indefinite or uncertain, is void. That the force of such agreement is by way of estoppel. Verdict sustained.

7. It had been previously held in *Terry v. Chandler*, 16 N. Y. 354; S. C. 69 Am. Dec. 707, that such an agreement, where there was no uncertainty in the grants, and no adverse possession, was void, and this was approved in *Vosburg v. Teator*. In the former case, A. and his grantors having possessed land on both sides of a ditch for more than twenty years, under claim of title by deed, A. by parol agreed with B., who claimed some of the land so possessed on one side, that the ditch should constitute the division line, and B. entered and kept possession accordingly for five years. *Held*, not to affect the title, and that A. could recover possession.

8. A practical location is but the actual designation by the parties upon the ground of the monuments and bounds called for in the deed.<sup>1</sup>

<sup>1</sup> *Wells v. Jackson Manuf. Co.*, 47 N. H. 235; S. C. 90 Am. Dec. 575.

9. The subject was learnedly examined in *Turner v. Baker*, 64 Mo. 218; S. C. 27 Am. Rep. 226, where it was held, basing upon the New York authorities, that where the division line between two adjoining estates is indefinite or unascertained, the owners may effectually agree upon the true boundary, and the line thus ascertained will control their deeds, and a jury may infer a practical location of a disputed boundary line by agreement, from long acquiescence, less than the period necessary to constitute adverse possession, and from acts and declarations of the parties. Two owners of a tract of land agreed in 1864 to divide it equally, established the division line, set out a hedge and fence upon it, cultivated and improved the land with reference to that line, and both subsequently sold their interests to third parties who knew of that agreement. *Held*, that as the statute of limitation had run, the line might not be questioned, although it did not equally divide the tract.<sup>1</sup> In the absence of dispute or disagreement about the true boundary line between two proprietors on either side of a section, neither of them is estopped from asserting the true boundary by his acquiescence in the building and maintaining of fences along a highway intended to be laid out on the true boundary line, but erroneously located, and by occupancy to those fences for less than twenty years.<sup>2</sup> Mere agreement that the boundary should be different from what it had formerly been considered held inadmissible in ejectment between the owners.<sup>3</sup> Where in a conveyance of land, a description is given, which is ambiguous or variable, it is competent by parol evidence to show that the parties, at the time of the conveyance, agreed upon a certain line, or some monument, whereby to ascertain the line as the boundary intended.<sup>4</sup>

<sup>1</sup> *Trussel v. Lewis*, 13 Neb. 415; 42 Am. Rep. 767.

<sup>2</sup> *Hass v. Plautz*, 56 Wis. 105; 43 Am. Rep. 699.

<sup>3</sup> *Smith v. Dudley*, 1 Litt. 66; S. C. 13 Am. Dec. 222.

<sup>4</sup> *Horner v. Stillwell*, 35 N. J. L. 307. See also *Kip v. Norton*, 12 Wend. 127; S. C. 27 Am. Dec. 120.

*Brown v. Caldwell*, 10 S. & R. 114; S. C. 13 Am. Dec. 660.

*Sawyer v. Fellows*, 6 N. H. 107; S. C. 25 Am. Dec. 452.

*George v. Thomas*, 16 Tex. 74; S. C. 67 Am. Dec. 612.

*Nichol v. Lytle's Lessee*, 4 Yerg. 456; S. C. 26 Am. Dec. 240.

*Smith v. Hamilton*, 20 Mich. 433; S. C. 4 Am. Rep. 398.

*Krider v. Milner*, 99 Mo. 145; S. C. 17 Am. St. Rep. 549.

*White v. Spreckels*, 75 Cal. 610.

*Atchison v. Pease*, 96 Mo. 566.

*Archer v. Helm*, — Miss. —; 11 So. Rep. 3.

*Jones v. Pashby*, 67 Mich. 459; S. C. 11 Am. St. Rep. 589.

*Harn v. Smith*, 79 Tex. 310; S. C. 23 Am. St. Rep. 340.

*Harris v. Oakley*, 130 N. Y. 1.

On the subject of proof of boundaries by acquiescence and agreement generally, reference is made to the cases in the footnote.<sup>1</sup>

### Sec. 103. Resulting trust.

In the absence of statutory enactment to the contrary, parol evidence is competent to engraft a resulting trust upon a deed, even after the death of the nominal purchaser, in favor of a third party paying the consideration.<sup>2</sup>

The ground of this rule is admirably stated in *Pritchard v. Brown*, 4 N. H. 397; S. C. 17 Am. Dec. 431: "It is never stated in the deed to whom the money paid belonged. Nor have the terms in which the payment is commonly expressed in the deed

<sup>1</sup> *Stone v. Clark*, 1 Metc. 378; S. C. 35 Am. Dec. 370.

*Jackson v. Perrine*, 35 N. J. L. 137.

*Crafts v. Hibbard*, 4 Metc. 452.

*Choate v. Burnham*, 7 Pick. 278.

*Frost v. Spaulding*, 19 Pick. 445; S. C. 31 Am. Dec. 150.

*Hastings v. Stark*, 36 Cal. 122.

*Wheelock v. Moulton*, 15 Vt. 519.

*Raymond v. Coffey*, 5 Oreg. 132.

*Gratz v. Beates*, 45 Pa. St. 504.

*Kennedy v. Lubold*, 88 Pa. St. 257.

*Winnissimmet Co. v. Wyman*, 11 Allen, 439.

*Stewart v. Patrick*, 68 N. Y. 450.

*French v. Pearce*, 8 Conn. 439; S. C. 21 Am. Dec. 680.

*Jones v. Pashby*, 67 Mich. 459; S. C. 11 Am. St. Rep. 589.

*City of Bloomington v. Bloomington*, etc. Ass'n, 126 Ill. 221.

*Edwards v. Smith*, 71 Tex. 156.

*Bird v. Stark*, 66 Mich. 655.

<sup>2</sup> *Boyd v. McLean*, 1 Johns. Ch. 582.

*Blodgett v. Hildreth*, 103 Mass. 484.

*Thompson's Lessee v. White*, 1 Dall. 424; S. C. 1 Am. Dec. 252.

*Strimpfler v. Roberts*, 18 Pa. St. 283; S. C. 57 Am. Dec. 606.

*Pritchard v. Brown*, 4 N. H. 397; S. C. 17 Am. Dec. 431.

*Smitheal v. Gray*, 1 Humph. 491; S. C. 34 Am. Dec. 664.

*Baker v. Vining*, 30 Me. 121; S. C. 50 Am. Dec. 617.

*Miller v. Thatcher*, 9 Texas, 482; S. C. 60 Am. Dec. 172.

*Dunham v. Chatham*, 21 Tex. 231; S. C. 73 Am. Dec. 228.

*Lingenfelter v. Ritchey*, 58 Pa. St. 485; S. C. 98 Am. Dec. 308.

*Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527.

*Neill v. Keese*, 5 Tex. 23; S. C. 51 Am. Dec. 746.

*Hollida v. Shoop*, 4 Md. 465; S. C. 59 Am. Dec. 88.

*Hall v. Sprigg*, 7 Martin, 243; S. C. 12 Am. Dec. 506.

*McGinity v. McGinity*, 63 Pa. St. 38.

*Farmlee v. Sloan*, 37 Ind. 469.

*Kane County v. Herrington*, 50 Ill. 232.

*M'Guire v. M'Gowen*, 4 Dessau. Eq. 486.

*Harvey v. Ledbetter*, 48 Miss. 95.

*Faris v. Dunn*, 7 Bush, 276.

*Holder v. Nunnally*, 2 Coldw. 288.

*Byers v. Danley*, 27 Ark. 77.

*Pinney v. Fellows*, 15 Vt. 525.

*Creed v. Lancaster Bank*, 1 Ohio St. 1.

*Purdy v. Purdy*, 3 Md. Ch. 547.

*Foote v. Colvin*, 3 Johns. 216; S. C. 3 Am. Dec. 478.

*Contra*: *Fowke v. Slaughter*, 3 A. K. Marsh. 57; S. C. 13 Am. Dec. 133.

ever been construed necessarily to import that the money paid is the money of the person who is stated in the deed to have paid it. The ownership of the money is not a part of the contract to be deduced by construction from the terms of the instrument as a part of their legal import, but is merely presumed from a fact stated in the deed, which is of such a nature as to afford a reasonable ground from which to infer the ownership. It therefore seems to us to be exceedingly clear that parol evidence introduced in cases of this kind to show to whom the money belonged is not repugnant to the terms of the deed in such a sense as to render it inadmissible on that ground. \* \* \* Even if the evidence were repugnant to that clause in the deed which states the payment, it would still be competent testimony. It was not introduced to defeat the operation of the conveyance, and it may now be considered as settled in this State that a receipt in a deed may, for any other purpose, be contradicted like any other receipt." In *Smitheal v. Gray*, 1 *Humph.* 491; S. C. 34 *Am. Dec.* 664, the court say "the question is settled by authority both in England and the United States so conclusively that it is no longer debatable."

The grantor may not show that the deed was in trust for himself.<sup>1</sup>

But he may show that the object was to enable the grantee as his agent the better to sell and give title.<sup>2</sup> An absolute deed in consideration of love and affection may not be shown to be upon a resulting trust.<sup>3</sup> Nor may a deed absolute on its face be shown to be upon an express trust.<sup>4</sup> But an absolute deed may be shown to be upon a trust for charitable uses.<sup>5</sup> But where an express trust is established by a writing, parol evidence is not admissible to defeat it, but is admissible to define what was meant by the writing in case of ambiguity.<sup>6</sup>

<sup>1</sup> *Sturtevant v. Sturtevant*, 20 *N. Y.* 39;

S. C. 75 *Am. Dec.* 371.

*Salisbury v. Clarke*, 61 *Vt.* 453.

<sup>2</sup> *Collins v. Tillou's Adm'r*, 26 *Conn.* 368; S. C. 68 *Am. Dec.* 398.

<sup>3</sup> *Miller v. Stokely*, 5 *Ohio St.* 194.

<sup>4</sup> *Ratliff v. Ellis*, 2 *Iowa*, 59; S. C. 63 *Am. Dec.* 471.

*Steere v. Steere*, 5 *Johns. Ch.* 1; S. C. 9 *Am. Dec.* 256.

*Ashley v. Robinson*, 29 *Ala.* 112; S. C. 65 *Am. Dec.* 387.

*Simms v. Smith*, 11 *Ga.* 198.

*Dickenson v. Dickenson*, 2 *Murphey*, 279.

*Lloyd v. Inglis*, 1 *Des. Eq.* 333.

*Harris v. Barnett*, 3 *Gratt.* 339.

*McElderry v. Shipley*, 2 *Md.* 25; S. C. 56 *Am. Dec.* 703.

*Gowdy v. Gordon*, 122 *Ind.* 533.

The contrary is intimated in *Miller v. Stokely*, 5 *Ohio St.* 194.

<sup>5</sup> *Mannix v. Purcell*, 46 *Ohio St.* 102; S. C. 15 *Am. St. Rep.* 562.

<sup>6</sup> *Steere v. Steere*, 5 *Johns. Ch.* ; 1 *S. C.* 9 *Am. Dec.* 256.

This rule is probably very generally varied by statutes of frauds and of trusts.

#### **Sec. 104. As to covenants and reservations.**

Parol evidence is incompetent to add any covenant to a deed, or to enlarge or contradict any covenant, or create a reservation.<sup>1</sup>

1. In *Cabot v. Christie*, 42 Vt. 121, the court said: "It is true that the deed need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties. But it does purport to contain the covenants of the grantor in respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proved in respect to an ordinary bill of sale of personal property."<sup>2</sup>

2. In *Cook v. Combs*, it was attempted to prove an oral warranty of the quantity of land, before the delivery of the deed which contained no warranty. So of *Martin v. Hamlin*. In *Dutton v. Gerrish* it was sought to prove an oral warranty of fitness on a lease containing no such warranty. In *Marshall Co., etc., v. Iowa, etc.*, it was sought to engraft on the deed the condition of raising a certain amount as an endowment. In *Bryan v. Swain* the attempt was to show a parol agreement to convey a good title, when the deed contained no such warranty. In *Raymond v. Raymond* the attempt was to enlarge a warranty against all persons

<sup>1</sup> *Dutton v. Gerrish*, 9 Cush. 89; S. C. 55 Am. Dec. 45.

*Cook v. Combs*, 39 N. H. 592; S. C. 75 Am. Dec. 241.

*Cabot v. Christie*, 42 Vt. 121; S. C. 1 Am. Rep. 213.

*Marshall Co. v. Iowa, etc. Synod*, 28 Iowa, 360.

*Bryan v. Swain*, 56 Cal. 616.

*MacLeod v. Skiles*, 81 Mo. 595; S. C. 51 Am. Rep. 254.

*Flynn v. Bourneuf*, 143 Mass. 277; S. C. 58 Am. Rep. 135.

*Martin v. Hamlin*, 18 Mich. 358.

<sup>2</sup> See also *Martin v. Hamlin*, 18 Mich. 354; S. C. 100 Am. Dec. 181.

*Raymond v. Raymond*, 10 Cush. 134.

*Lloyd v. Farrell*, 48 Pa. St. 73; S. C. 86 Am. Dec. 563.

*Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346.

*Heffron v. Cunningham*, 76 Tex. 312.

*Chaplin v. Baker*, 124 Ind. 385.

*Leonard v. Clough*, 133 N. Y. 292.

*Johnson v. Walter*, 60 Iowa, 315.

*Tennessee, etc. R. Co. v. East Ala. Ry. Co.*, 73 Ala. 426.

claiming against the grantor to a general warranty. And the same is held of contracts for deeds. Thus an additional oral agreement to pay subsequent taxes on the lands is inadmissible, where the contract provides for the payment of prior taxes.<sup>1</sup> In *Williams v. Searcy*, — Ala. — ; 10 So. Rep. 632, where a contract for the sale of land provides that \$7,000 of the purchase price is to be paid in "original ground floor or treasury stock" of a corporation into which the land is to be put by the purchaser, parol evidence is inadmissible in a suit by the seller on the contract to show that it was agreed that the land should be put in at a certain price, and that if it was put in at a greater price the seller was to receive a greater amount of stock than \$7,000.

3. In *Woodward v. Foster*, 64 Hun, 147, it was held that a reservation of a life estate may not be established by parol as against a deed in fee. The court said: "The obvious result of the evidence introduced to establish this claimed defense, if given effect, was to reduce the title conveyed by the defendant's deed, and to carve out of an absolute title in fee simple a life estate in the grantor. Thus the question is presented whether parol evidence was admissible for that purpose. That it was inadmissible under the general rule, prohibiting the admission of parol contemporaneous evidence to contradict or vary the terms of a valid written instrument, there can be no doubt. It is however contended that the evidence was admissible under an exception to the rule which permits parol evidence when the original contract is verbal and entire and a part only is reduced to writing. The existence of this exception must be recognized, but evidence is not admissible under it which contradicts or varies the written instrument; to be admissible it must be consistent with it. *Chapin v. Dobson*, 78 N. Y. 74; *Thomas v. Scutt*, 127 id. 133, 138. Therefore the evidence was not admissible under that exception, because it was not consistent with, but in contradiction of, the deed. There is no claim that the deed was to be given full effect, and the plaintiff's grantor to execute to the defendant a valid lease. The evidence shows that that was not contemplated. We are of the opinion that the evidence admitted fell within the condemnation of the general rule excluding parol evidence when in effect it would change or destroy the agreement between the parties which they have reduced to writing. This conclusion seems to be sustained by the authorities. *Wilson v.*

<sup>1</sup> *Gilbert v. Stockman*, 76 Wis. 62; S. C. 20 Am. St. Rep. 23.

Deen, 74 N. Y. 531; Eighmie v. Taylor, 98 id. 288; Snowden v. Guion, 101 id. 458, 462; Long v. Millerton Iron Co., 101 id. 638; Corse v. Peck, 102 id. 513; Sanders v. Cooper, 115 N. Y. 279; Gordon v. Niemann, 118 id. 152; Englehorn v. Reitlinger, 122 id. 76; Read v. Bank of Attica, 124 id. 671; Thomas v. Scutt, 127 id. 138. The case of Hutchins v. Hutchins 98 N. Y. 56, was very similar to this in many respects. In that case it was held that a reservation of a life estate to the grantor could not be proved by parol when there was a deed in fee." So in Canady v. Stiger, 55 N. Y. 452, where deeds of property were exchanged while contractors were building houses on some of the property with the expectation that the houses would be finished, but without covenants in the deed to that effect, and the contractors afterwards failed to finish and build the houses, it was held that the loss fell on the party who had accepted the deed without covenants therein to cover it. The court said (p. 454): "The defendant, if he did not, had the opportunity to make a personal examination, and the evidence shows that when the deed was executed, at all events he knew that the house was not entirely finished. The fact that it was unfinished was observable from the outside, and of course was patent from an inside view. The defendant received what he bargained for, and he had accepted a delivery of the deed and the property, and if it was not in the precise condition he expected, he is foreclosed, in the absence of fraud or mistake, by the maxim *caveat emptor*."

4. In *Armstrong v. Munday*, 5 Denio, 166, a vendee covenanted to pay a certain sum for the lands, a specified amount thereof to the vendor, and certain amounts to A and B, respectively, as the vendor should direct at the time of executing the deed; the vendor directed a certain sum to be paid to A, but nothing to B. Held, that oral evidence was not admissible to show that the premises were incumbered by a mortgage given by the vendor to B., and that at the time of making the contract the vendor had orally agreed that the vendee might pay the amount thereof to B. The court said: "Parol evidence however cannot be received to control or change what is in writing, and the covenant must be carried into effect, as it would be if such had been what was really intended by the parties." This was an action of covenant by the vendor to recover from the vendee the amount paid by him to B, the deed having been executed and delivered.

*Contrary doctrine:* There are some cases to the contrary.

1. Thus in *Carr v. Dooley*, 119 Mass. 294, while negotiations for the purchase of land were pending, the purchaser called the vendor's attention to a sewer in construction in the abutting street, and asked him who was to pay for it, and he replied that he would. The deed warranted against incumbrances, but was silent as to the sewer. Parol evidence of the oral agreement was admitted. So in *McCormick v. Cheevers*, 124 Mass. 262, the same was held as to a prior oral agreement to pay an assessment for grading. These cases contain no discussion of the point, and proceed on the ground that the agreements were independent and for a consideration entering into the deed. They were cited and followed in *Green v. Batson*, 71 Wis. 54; S. C. 5 Am. St. Rep. 194, where it was held that damages by a breach of warranty of the quality of land may be proved by parol to defeat an action on a note for the purchase money, although the deed contains only the ordinary covenants and the agreement as to quality is not in writing. The same was held in *Saville v. Chalmers*, 76 Iowa, 325. The court said in *Green v. Batson*: "As a general rule, when the contract of the parties is reduced to writing and is apparently complete, the written instrument is supposed to contain the whole contract, and it cannot be varied by parol. This perhaps is the universal rule in respect to contracts relating to personal property. But contracts in respect to the sale and conveyance of land form an exception to this general and salutary rule. It might be more proper to say that such contracts do not come within the general rule. Preceding the conveyance there is of course always an agreement of sale. The deed may contain a very small part of such contract. The deed is only made in execution of the contract. It does not attempt to state the entire agreement in respect to the subject-matter, but is merely adapted to transfer the title in part execution of the contract, and is manifestly incomplete. Deeds are supposed to contain only the ordinary covenants of title, and seldom if ever contain a warranty in respect to the quality of the land. \* \* \* This court has recognized this exception in respect to deeds of conveyance, in *Hahn v. Doolittle*, 18 Wis. 196; S. C. 86 Am. Dec. 757; citing also *Hubbard v. Marshall*, 50 Wis. 326; *Wood Presump. Ev.* 5690; *Whart. Ev.* § 1026; *Chapin v. Dobson*, 78 N. Y. 74; S. C. 34 Am. Rep. 512; *Miller v. Fichthorn*, 31 Pa. St. 260; *Ludeke v. Sutherland*, 87 Ill. 481; S. C. 29 Am. Rep. 66." In *Buzzell v. Willard*, 44 Vt. 44, it was part



of the contract of sale that the grantor should put a wheel into the mill. It was allowed to be proved by parol.<sup>1</sup>

2. The cases of *Carr v. Dooley* and *McCormick v. Cheevers* seem to have been quietly overruled in *Flynn v. Bourneuf*, 143 Mass. 277; S. C. 58 Am. Rep. 135, where Holmes, J., said: "It is enough to say" of them "that they were evidently not intended to overrule the decision in *Howe v. Walker*, 4 Gray, 318, that a covenant against incumbrances would exclude proof of a contemporaneous oral undertaking of a larger scope, upon the same consideration." The New York, California and New Hampshire cases cited are not at all in point.

3. In *Durkin v. Cobleigh*, — Mass. —; 30 N. E. Rep. 474, it was held that an agreement to grade a street and have water put into it, as an inducement for one to buy a lot bounded on it, is independent and collateral, which need not be included in the deed, but may be shown by parol. The court said; "There are many cases in which this question has been presented, and the decisions are not entirely harmonious. Thus in *Naumberg v. Young*, 44 N. J. L. 331, the court disapproved of the decisions in *Morgan v. Griffith*, L. R. 6 Exch. 70, and *Erschine v. Adeane*, L. R. 8 Ch. App. 756, in which cases it was held that an oral agreement by a lessor to destroy the rabbits might be proved. In an early Massachusetts case it was held that a lessor is not bound by an oral agreement to provide other and better accommodations than those stipulated for in the lease. *Brigham v. Rogers*, 17 Mass. 571. And on a written contract of sale of goods, an additional warranty cannot be proved by parol. *Whitmore v. Iron Co.* 2 Allen, 52, 58; *Eighmie v. Taylor*, 98 N. Y. 288. So where one by a written instrument agreed to sell out his business stand and stock of goods, it cannot be shown by parol that he also agreed not to engage in a similar business in the same town. *Doyle v. Dixon*, 12 Allen, 576; *Wilson v. Sherburne*, 6 Cush. 68. On the other hand, in several cases more nearly resembling the present in their facts, it has been held that an additional oral agreement might be proved. Thus oral agreements by vendors of land requiring to be filled, that they will pay for the filling, have been held to be independent collateral agreements which might be enforced. *Page v. Monks*, 5 Gray, 492; *McCormick v. Cheevers*,

<sup>1</sup> See also *Ingersoll v. Truebody*, 40 Cal. 603.

*Kingsbury v. Moses*, 45 N. H. 223.

To the same effect, *Laudman v. Ingram*, 49 Mo. 212.

124 Mass. 262. The case of *Graffam v. Pierce*, 143 Mass. 386, was deemed to come within the same doctrine. It was determined in *Ayer v. Manuf. Co.*, 147 Mass. 46, that a manufacturer of goods who accepted a written order, with stipulations as to quality, price, rebate or claims for allowance, might be held on an oral agreement to advertise the goods. See also *Willis v. Hulbert*, 117 Mass. 151; *Rennell v. Kimball*, 5 Allen, 356; *Taylor Ev.* §§ 1135, 1147. It seems to us that the case falls within the last class of decisions, and that the alleged agreement of the defendant should be treated as an independent collateral agreement, which need not be included in the deed."

4. So in *Maris v. Iles*, Indiana Appellate Court, 30 N. E. Rep. 152, it was held that "under a deed of general warranty it may be established by parol that the grantee undertook to pay any particular lien or discharge any incumbrance, as part of the consideration, where the deed is silent upon the subject. There is some conflict over this rule in other States, but it cannot be regarded as a debatable question in this State."

In a note on *Green v. Batson*, 5 Am. St. Rep. 201, Mr. Freeman says: "While these cases do not profess to depart from the general rule, which rejects parol evidence when offered to vary or enlarge a written contract, they seem to us to proceed to evade that rule, without suggesting any general test by which to determine when such evasion is proper. In fact, while professing to respect the rule, they refuse to apply it; and if they be judicially sound, we know not when the rule may not be held inapplicable, or whether the existence of the rule ought to be affirmed or denied with the more confidence. They furnish additional proof that 'hard cases are the quicksands of the law,' in which quicksands the law is either hidden from sight or smirched beyond recognition."

It can scarcely be claimed that these cases are defensible on the doctrine of explanation of consideration, for they do not purport to seek to show an additional consideration paid, but something additional agreed to be given for the same consideration.

*Oral condition between execution and delivery:* In *Remington v. Palmer*, 62 N. Y. 31, it is held that the deed does not merge an agreement made after the execution of the deed and before delivery. Thus where the vendor, after the execution but before delivery, orally promised that if the vendee would accept the deed and pay the purchase money, he would pay an assessment dis-

covered to have been laid upon the premises, it was held competent to prove the promise by parol. The court said: "It is said that all agreements preceding the delivery of the deed were merged in the same. This position is not a sound one, for while all prior agreements may be merged in the deed when executed, it by no means follows that before the contract is fulfilled by a delivery and acceptance of the deed, conditions may not be made which are obligatory upon the parties. The deed being ready for delivery, and the plaintiff ready to pay the money, they had a perfect right to exact, as a condition of fulfilling the contract, that the defendant should pay the assessment when it became due. This is not contradicting a written instrument by parol, but evidence of the terms upon which the money was paid and the conveyance delivered. As the agreement in regard to the consideration was made after the deed was executed and before delivery, there could be no merging of this agreement in the deed. *Murdock v. Gilchrist*, 52 N. Y. 242."

*The rule in actions for specific performance of contracts for deeds:* Parol evidence is admissible in actions for specific performance, to show that parties have taken possession and partly performed a verbal contract; or that they have taken possession and partly performed under a written contract which is defective under the statute of frauds; or that the vendee should not be compelled to accept title, because of a defect therein, although the contract contains no covenant of title or against liens, except that implied by law; or that surprise, mistake, or fraud, entered into the contract and should defeat it, or that a condition precedent had not been performed by the party seeking specific performance, or that he has broken, abandoned, or otherwise waived the contract; but after the execution of contracts for the sale of land, in the absence of evidence of mutual mistake or fraud, parol evidence will not be received to show that the premises should have been deeded free from incumbrances, but were not, or that the vender should have had good title thereto, but did not, or that the premises were to have been of a better quality than the premises conveyed; parol evidence not being received after the execution of the contract and the acceptance of a deed, because prior negotiations are presumed to have been merged therein, and the vendee is assumed to have protected himself by covenants in his deed, if he was to be so protected, and he must therefore rely on his covenants, in the absence of

fraud or mistake, to make good any damage ne has sustained. Chancellor Kent says (2 Kent's Commentaries, 473): "I apprehend that in sales of land the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title." And he states the rule to be the same in England, as to lands and chattels both.

*Abbott v. Allen*, 2 Johns. Ch. 519, was a case where an injunction was sought against the foreclosure of a mortgage given for purchase money in return for a deed. The chancellor dissolved the injunction against the foreclosure, saying (p. 520): "If there be no fraud in the case, the purchaser must resort to his covenants if he apprehends a failure or defect of title, and wishes relief before eviction. This is not the appropriate tribunal for the trial of titles to land."

In *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79, an action was brought to foreclose a mortgage, and it was set up by way of defense thereto, that the consideration thereof was a contract for the sale of about twenty thousand acres of valuable land in the State of Kentucky, which had been located and secured to him (the vender) either by sure and perfect grants, or other assurance from the said State, or by valid locations and surveys which entitled him to patents from the State; that about five months thereafter, a deed of the lands had been given by the vendor's executors; that thereafter it was discovered that the vendor had no good title to the lands. The chancellor cites with approval, *Bree v. Holbech* (Doug. 654), and says of that case that it was there held that "it was incumbent upon the purchaser to have looked to the title." He further says (p. 86): "Even if the mere failure of title was made out, it would not alter the case or help the defendant, for he took the risk of the goodness of the title upon himself."

In *Bates v. Delavan*, 5 Paige, Ch. 299, at page 307, the court said: "I agree however with the learned commentator on American law, that the weight of authority, both in this State and in England, is against this principle, so far as a mere failure of title is concerned; and that the vendee, who has consummated his agreement by taking a conveyance of the property, must be limited to the rights which he has derived under the covenants.

therein, if he has taken the precaution to secure himself by covenants of warranty as to the title."

The rule is still more tersely stated by Rapallo, J., in *Whittemore v. Farrington*, 76 N. Y. 452; a case where there was a verbal agreement for the exchange and conveyance of lands, the agreement being "to convey a good title, free from incumbrances," as the trial court found. One party refused to give a warranty deed, but gave a mere quit-claim, and the other party was induced to accept it, as the court found, because he was induced to suppose and believe the deed conveyed a good and perfect title, and there were no incumbrances on the premises. The court further found that there was a mortgage on the premises quit-claimed, although neither party knew it, and he directed judgment that the deed be reformed, by inserting therein covenants of warranty and against incumbrances, unless the defendant would discharge the mortgage. The Court of Appeals held that these facts did not amount to showing a fraud, and hence the judgment could not be sustained. The court said (p. 457):

"The question is then reduced to this: A party, who under a verbal agreement for the conveyance to him of lands, is entitled to insist upon a good title and a deed with covenants, pays the consideration and is then tendered a deed without covenants. He demands a deed with covenants, and this is refused. He then accepts the deed without covenants, and believing the title to be clear, records it, and continues to occupy and improve the property. An incumbrance unknown at the time to both parties is afterwards discovered. Both parties are innocent of any fraud. It is conceded that no legal liability rests upon the grantor in such a case. *Bates v. Delavan*, 5 Paige, 300, 307; *Burwell v. Jackson*, 9 N. Y. 535. In the absence of fraud or covenants, the purchaser takes the title at his own risk."

In *Baldwin v. Palmer*, 10 N. Y. 233, an action was brought to recover money paid out on an assessment for a local improvement in the City of New York, because the party had agreed to convey "clear of incumbrances" by an *oral* agreement. There was a nonsuit, and on appeal to the Court of Appeals, that Court said: "Although the agreement has been executed between the parties so far as to consummate the sale by a conveyance and the payment of the purchase money, yet a voluntary part performance of a contract originally void, is not a ground for a compulsory performance of the residue of the same contract; a party sought to

be charged, is still at liberty to raise the objection in a court of law. Part performance, without more, is not a waiver of the objection."

In *Stoddard v. Hart*, 23 N. Y. 557, an oral agreement was made that a mortgage, securing \$200, should stand as further security for \$180 more, and the bond to which the mortgage was collateral was changed so as to cover this additional \$180. The court held that the mortgage could not be reformed so as to cover the additional \$180, and specific performance could not be decreed as to the \$180 in any way, saying (p. 561): "Consequently, if enough was not done to create a mortgage, then none was created (for the \$180, of course). There is no room for the doctrine of specific performance, because there is nothing unperformed. The parties may have misunderstood the effect of what they did, but nothing in the transaction was left unfinished, of which equity can now decree the complete execution. The question then is upon the legal interpretation and effects of the acts done, which we have seen fail to create a lien. The understanding and belief of the parties do not change the law." \* \* \* "If a writing does not truly express the agreement of the parties, if anything was omitted which was agreed to be inserted, or if anything was inserted contrary to their intention, equity will relieve against the mistake by reforming the contract. But in this case no mistake is alleged or proved. Everything agreed upon was done. \* \* \* Will a court of equity then make a new contract for the parties, in order to effectuate a mere understanding, where no *agreement* is pretended different from the one which the writing already expresses, and where there are no circumstances of surprise, imposition, fraud, or misplaced confidence? To do so, I think would be taking a step in advance of the settled rule on the subject; especially if the relief sought be in direct opposition to the statute of frauds."

In *Delavan v. Duncan*, 49 N. Y. 485, it is held that a contract to sell and convey land can only be performed by giving a deed that will vest an indefeasible title in the grantee.

In *Burwell v. Jackson*, 9 N. Y. 535, it is held that there is an implied warranty on the part of the vendor that he has good title in every executory agreement for the sale of lands, which continues until merged in the deed of conveyance. The court said (p. 541): "We have a statute also which provides that no covenant shall be implied in any conveyance of real estate. The

practice has now become universal, both in England and in this country, for the purchasers to protect themselves by procuring the insertion of express covenants in their deeds of conveyance; and it is found to be most consonant to justice to apply the maxim *caveat emptor* to such cases, and to require the purchaser to look to his express covenants alone. But neither this rule, nor the reason upon which it is founded, applied to executory agreements to sell and convey lands *in futuro*. In respect to such agreements, the principles upon which the doctrine of implied warranty rests, are still applied, as well in this country as in England, in all their force."

In *Lewis v. Gollner*, 129 N. Y. 227; S. C. 26 Am. St. Rep. 516, on the assignment of a contract for the purchase of lands, the purchaser and assignor orally agreed not to erect any flats in the neighborhood. The court held this specifically enforceable, and enjoined the purchaser from such erection.

*Consideration of love and affection:* But the consideration of love and affection will not support an executory covenant. Thus in *Matter of Wilbur v. Warren*, 104 N. Y. 192, W. purchased land, subject to a mortgage, which by the deed he assumed and agreed to pay. He conveyed the land to his daughter, with full covenants, not referring to the mortgage. The only consideration for that deed was love and affection. W. subsequently paid part of the mortgage. After his death the daughter paid interest on the mortgage and claimed therefor against his estate. It was held that the daughter took the land subject to the mortgage, and that the covenants in her deed were invalid and imposed no obligation on W. The court said: "The daughter took the land charged with the mortgage, and if she pays it out of her own means, nothing is taken from her which her father had given her. If, on the other hand, the estate of the father is compelled to pay the mortgage, she in effect is enabled to perfect an unexecuted gift to the prejudice of others interested in the estate."

## CHAPTER XVII.

## RECEIPTS, BILLS OF LADING, RELEASES.

- SEC. 105. Receipts.  
 106. Bills of Lading—as between the parties.  
 107. Bills of Lading—as to *bona fide* consigners.  
 108. Bills of Lading—contract collateral or supplementary.  
 109. Bills of Lading—non-assent to stipulations.  
 110. Releases.

## Sec. 105. Receipts.

A mere receipt, not constituting nor embodying a contract may be contradicted or explained by parol evidence as to the consideration or as to what was apparently intended to be included or affected thereby.<sup>1</sup>

1. In *Witzler v. Collins*, 70 Me. 303; S. C. 35 Am. Rep. 327, the court said: "A receipt is open to explanation by evidence

- <sup>1</sup> *Goodwin v. Goodwin*, 59 N. H. 548.  
*Riley v. Mayor*, 96 N. Y. 331.  
*Harper v. Dail*, 92 N. C. 394.  
*Dorman v. Wilson*, 39 N. J. L. 474.  
*Swain v. Frazier*, 35 N. J. Eq. 326.  
*Hildreth v. O'Brien*, 10 Allen, 104.  
*Flood v. Joyner*, 96 Ind. 459.  
*Ditch v. Vollhardt*, 82 Ill. 134.  
*Lowe Bros. v. Young*, 59 Iowa, 364.  
*Buswell v. Poiner*, 37 N. Y. 312.  
*Hotchkiss v. Mosher*, 48 N. Y. 478.  
*Brice v. Hamilton*, 12 S. C. 32.  
*Fuller v. Crittenden*, 9 Conn. 406.  
*Hicks v. Morris*, 57 Tex. 658.  
*Sears v. Wempner*, 27 Minn. 351.  
*Russell v. Church*, 65 Pa. St. 9.  
*Farrar v. Hutchinson*, 9 Ad. & Ell. 641.  
*Wallace v. Kelsall*, 7 M. & W. 273.  
*Lee v. Lan., etc., Ry. Co., L. R.* 6 Ch. App. 527.  
*Taylor Ev. sec.* 1134.  
*Ensign v. Webster*, 1 Johns. Cas. 145.  
 S. C. 1 Am. Dec. 108.

- Fobey v. Barber*, 5 Johns. 68; S. C. 4 Am. Dec. 326.  
*Grier v. Huston*, 8 S. & R. 402; S. C. 11 Am. Dec. 627.  
*Raymond v. Roberts*, 2 Aikens, 204; S. S. 16 Am. Dec. 698.  
*Brooks v. White*, 2 Metc. 283; S. C. 37 Am. Dec. 95.  
*Shotwell v. Hamblin*, 23 Miss. 156; S. C. 55 Am. Dec. 83.  
*O'Brien v. Gilchrist*, 34 Me. 554; S. C. 56 Am. Dec. 676.  
*Bridge v. Gray*, 14 Pick. 55; S. C. 25 Am. Dec. 358.  
*Pribble v. Kent*, 10 Ind. 325; S. C. 71 Am. Dec. 327.  
*Foster v. Newbrough*, 58 N. Y. 481.  
*Thompson v. Maxwell*, 74 Iowa, 415.  
*Mitchell v. U. S. Express Co.*, 46 Iowa, 214.  
*Payson v. Lamson*, 134 Mass. 593.  
*Irwin v. Thompson*, 27 Kans. 643.  
*Allen v. Pink*, 4 M. & W. 140.



*aliunde*, not because the matters therein referred to are more or less apparent, but because it is an admission and nothing more than an admission, and its value is the same whether written or verbal, qualified or absolute."

2. In *De Lavallette v. Wendt*, 75 N. Y. 579; S. C. 31 Am. Rep. 495, parol evidence was held admissible to show that an instrument reading, "Received of A. \$500, due on demand," was not intended as a promise to pay, but as a mere receipt for money paid on account. And in *Filkins v. Whyland*, 24 N. Y. 343, parol evidence was allowed to show a warranty of a horse sold upon a writing as follows: "F. bought of W. one horse, \$150. Received payment. W." To this effect is *Allen v. Pink*, 4 M. & W. 140. If an instrument can at the utmost be considered merely as the recital of things which have been agreed on, and not the agreement itself, parol evidence is admissible to prove a warranty.<sup>1</sup> Where a receipt was given to an executor in his individual name, parol evidence is admissible to show that it was for property belonging to him as executor, and not to himself in his own right, and that it was thus understood at the time by the signers.<sup>2</sup> A receipt of "payment by note" may be shown not to have been intended to evidence payment, but only to have been intended as a receipt for the note.<sup>3</sup> So a receipt for money on a bond may be shown to have been for the obligor's note.<sup>4</sup> So a sealed certificate of the payment of a mortgage may be contradicted.<sup>5</sup> A certificate of deposit may be explained by parol.<sup>6</sup> A carrier's receipt for goods may be shown by parol to have been given under such circumstances as not to bind him.<sup>7</sup> A receipt for a note, "but not to be paid until notes of S. H. Knapp's are paid," may be shown by parol to be collateral.<sup>8</sup> Evidence to show what account moneys credited in an account rendered were paid upon is proper.<sup>9</sup>

3. In *Raymond v. Roberts*, 2 Aikens, 204; S. C. 16 Am. Dec. 698, it is said: "The true reason why receipts are open to parol investigation, and to be varied in their operations and even contradicted, according to the cases cited is, that they are usually general in their expressions, and many matters, not thought of

<sup>1</sup> *Brigg v. Hilton*, 99 N. Y. 517.

<sup>2</sup> *Wadsworth v. Allcott*, 6 N. Y. 64.

<sup>3</sup> *Buswell v. Poiner*, 37 N. Y. 312.

<sup>4</sup> *Swain v. Frazier*, 35 N. J. Eq. 326.

<sup>5</sup> *Thompson v. Layman*, 41 Minn. 295.

<sup>6</sup> *Hotchkiss v. Mosher*, 48 N. Y. 478.

<sup>7</sup> *Scovill v. Griffith*, 12 N. Y. 509.

<sup>8</sup> *Wightman v. Overheiser*, N. Y. C. P.

<sup>9</sup> *Richard v. Wellington*, 66 N. Y. 308.

at the time, might be controlled by their general expressions, contrary to right and contrary to the intention of the parties; and many mistakes are made in settlements, to correct which the doors of justice should not be shut by the general terms of a receipt, which describes no particulars of what is settled. But when a receipt contains no general or vague expressions, but all is definitely descriptive of what is intended to be effected by it, such a receipt, like other writings in general, must not be assailed with parol testimony, unless on the ground of fraud." So a receipt "in full of all demands" includes judgments, and the contrary intention may not be shown.<sup>1</sup> The same is true of a receipt "in full" of a demand for unliquidated damages.<sup>2</sup> This is put on the ground that it is a release. So in *Stapleton v. King*, 33 Iowa, 28; S. C. 11 Am. Rep. 109, where the subject is learnedly examined, and a receipt for a less quantity of wool than was due, "the abatement thus made to settle all difficulty of alleged disease in said sheep," was held not contradictable by parol. In *Schultz v. Coon*, 51 Wis. 416; S. C. 37 Am. Rep. 839, a receipt for goods specifying kinds, numbers and total value, all in the receiver's handwriting, upon which the other indorses money paid at the time, parol evidence was rejected to show that the goods were received on commission and not on purchase. The court held it a contract of sale in form of a receipt, without ambiguity or uncertainty.

4. So in *Ryan v. Ward*, 48 N. Y. 204; S. C. 8 Am. Rep. 539, under a contract for the delivery of hides, plaintiff was to receive a *bonus* on each hide delivered. At each delivery defendant paid the value of the hides, and received a receipt from plaintiff expressed to be *in full*. The *bonus* was not paid. Held, that plaintiff could recover the *bonus*, notwithstanding the receipts. The court said: "The cases in which a receipt has been held to be conclusive upon the party giving it will be found to be cases where the claims or amounts were in dispute or where a receipt was given for unliquidated damages." Cases of this description are *Coon v. Knap*, 8 N. Y. 402; *Squires v. Amherst*, 145 Mass. 192; *Howard v. Horton*, — N. Y. Sup. Ct. —; *Goodwin v. Goodwin*, 59 N. H. 548, a case of a receipt for money, and an agreement to waive all right to contest a will, etc. So in *Pratt v. Castle*, — Mich.; 22 N. W. Rep. 52, of a receipt of one dollar "in full of all

<sup>1</sup> *Henry v. Henry*, 11 Ind. 236; S. C. 71 Am. Dec. 354.

<sup>2</sup> *Coon v. Knap*, 8 N. Y. 402; S. C. 59 Am. Dec. 505.

debts, dues and demands to this date, except," etc., given on a settlement. So in *Langdon v. Langdon*, 4 Gray, 186, of a writing as follows: "Received of A. a note (describing it) for which I am to collect and account to the said A. the sum of \$110, when the above note is collected, or return said note back to said A. if I choose. But in *Winn v. Chamberlin*, 32 Vt. 318, such evidence was admitted to extend to other matters a receipt expressed to be in satisfaction of certain claims for breach of promise of marriage. Redfield, C. J., said: "To constitute a contract it must contain something more than the admission of the party of the existence of a previous fact or facts. It must either be in itself a conveyance of some right, positive or negative, or else must stipulate for the doing or omission of some act on the part of the maker."

### Sec. 106. Bills of Lading—as between parties.

The bare recital in a bill of lading of the receipt, quantity, value, or condition of the property may be contradicted as between the parties by parol.<sup>1</sup>

This is put on the ground that the recital is a mere receipt, open to contradiction like other receipts, and not partaking of the nature of a contract like the other usual provisions in such instruments. In *Witzler v. Collins*, 70 Me. 301; S. C. 35 Am. Rep. 327, the court said: "So far as a bill of lading is a receipt it has the same character as other receipts, and is subject to the same principles of law. We are not aware of any more solemnity in its execution, or any more importance to be attached to it than to other instruments of a like nature. It has often been decided that it may be modified, controlled or contradicted by parol testimony. Upon this point the authorities are numerous and uniform, or nearly so."

<sup>1</sup> *Dean v. King*, 22 Ohio St. 118.

*Hastings v. Pepper*, 11 Pick. 43.

*Chapin v. Chic. etc. Ry. Co.* 79 Iowa, 582.

*O'Brien v. Gilchrist*, 34 Me. 554; S. C. 56 Am. Dec. 676.

*Wayland v. Mosely*, 5 Ala. 430; S. C. 39 Am. Dec. 335.

*Relyea v. N. H. etc. R. M. Co.*, 42 Conn. 579.

*Bissel v. Price*, 16 Ill. 408.

*Shepherd v. Naylor*, 5 Gray, 591.

*Portland Bank v. Stubbs*, 6 Mass. 422; S. C. 4 Am. Dec. 151.

*Hunt v. Miss. etc. R. Co.*, 29 La. Ann. 446.

*Steamboat v. Young*, 3 G. Greene, 268. *Abbe v. Eaton*, 51 N. Y. 410.

*Richards v. Doe*, 100 Mass. 524.

*The Delaware*, 14 Wall. 601.

*Strong v. Grand Trunk R. Co.*, 15 Mich. 206; S. C. 93 Am. Dec. 184.

*Meyer v. Peck*, 28 N. Y. 590.

*So. Ex. Co. v. Newby*, 36 Ga. 635.

## Sec. 107. As to bona fide assignees.

The recital in a bill of lading of the receipt of the property may be contradicted even as against a *bona fide* consignee, or transferee of the bill, for value, where the bill was signed by an agent authorized only to sign bills on receipt of property, but who signed the bill without receiving the property.<sup>1</sup>

This is put on the ground that the principal is not liable for the act of a special agent beyond the scope of his employment, and also on the ground of fraud.

1. The leading English case is *Grant v. Norway* (1851), 10 C. B. 665. There Jervis, C. J., observed: "The authority of a master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship; but is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made. He may take up money in foreign parts, and in certain circumstances, at home, for necessary disbursements and repairs, and bind the owners for repayment; but his authority

<sup>1</sup> The *Lady Franklin*, 8 Wall. 325.

*Brown v. Powell Coal Co.*, L. R. 10 C. P. 562.

*McLean v. Fleming*, L. R. 2 S. C. App. 128.

*Schooner Freeman v. Buckingham*, 18 How. 182.

*Balt. etc. R. Co. v. Wilkens*, 44 Md. 11; S. C. 22 Am. Rep. 26.

*Sears v. Wingate*, 3 Allen, 103.

*La. Nat. Bank v. Laveille*, 52 Mo. 380.

*Union R. Co. v. Yeager*, 34 Ind. 1; *obiter*.

*Bates v. Todd*, 1 M. & R. 106.

*Grant v. Norway*, 10 C. B. 665.

*Hubbersty v. Ward*, 8 Ex. 330.

*Cox v. Bruce*, 18 Q. B. Div. 151.

*Black v. Wilmington, etc. R. Co.*, 92 N. C. 42; S. C. 53 Am. Rep. 450.

*Pollard v. Vinton*, 105 U. S. 7.

*Williams v. Wilmington, etc. R. Co.*, 93 N. C. 42.

*Friedlander v. Texas, etc. Ry. Co.*, 130 U. S. 416.

*Witzler v. Collins*, 70 Me. 290; S. C. 35 Am. Rep. 327.

3 Kent. Com. (13th ed.) 207, *n* 1.

1 Pars. Mar. Law, 135, *n* 2.

Redf. Railways (6th ed.), § 183.

Story Cont. (5th ed.) §§ 214, 215.

*Contra*: *Bank of Batavia v. N. Y. etc. R. Co.*, 106 N. Y. 195; S. C. 60 Am. Rep. 440.

*Armour v. M. C. R. Co.*, 65 N. Y. 11; S. C. 22 Am. Rep. 603.

*Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293; S. C. 54 Am. Rep. 319.

*Sioux City, etc. R. Co. v. First Nat. Bank*, 10 Neb. 556; S. C. 34 Am. Rep. 488.

*Brooke v. N. Y. etc. R. Co.* 108 Pa. St. 529.

*Savings Bank v. Atchison, etc. R. Co.*, 20 Kans. 519.

*St. Louis, etc. R. Co. v. Larned*, 103 Ill. 293.

is limited by the necessities of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may pretend that it is. He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So with regard to goods put on board, he may sign a bill of lading and acknowledge the nature and quality and condition of the goods. Constant usage shows that masters have that general authority; and if a more limited one is given, a party not informed of it is not affected by such limitation. Is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? for all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until the goods are on board, for it begins by describing them as *shipped*. It was not contended that such a course is usual. It is not contended that the captain had any real authority to sign the bills of lading unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not. If then from the usage of trade, and the usual practice of ship masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority, and in that case of course he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. \* \* \* So here the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and a party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."

2. In *Baltimore and Ohio Railroad Company v. Wilkens* (1876), 44 Md. 11; S. C. 22 Am. Rep. 26, the court said: "This being so, is there any legal principle which makes the appellant responsible to a consignee for advances on a bill of lading fraudulently issued by its agent, who was also his consignor, for goods never in fact received by it, and never placed in its cars? If any doctrine of commercial law can be regarded as well settled, it is

that the master has no authority to sign a bill of lading for goods *not actually put on board* the vessel, and therefore the owner of the ship is not responsible to parties taking or dealing with, or making advances on the faith of such an instrument which is untruthful in this particular. The consignee and every other party thus acting does so *with notice* of this limitation of the power of the master, and *acts at his own risk* both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped. In the early case of *Lickbarrow v. Mason*, 2 Term Rep. 75, it was said by Buller, J., that a bill of lading is *negotiable*, and on this an argument has been frequently made (supported to some extent by the *dicta* of able judges) that a third person dealing with such instruments should be protected in his reliance on them, according to their exact tenor, against charterer and owners as well as masters. But in *Grant v. Norway*, 10 C. B. 665; (2 Eng. Law & Eq. 337), where the question was for the first time distinctly presented for adjudication in England, the Court of Common Pleas, after full consideration, held that the master of a ship signing a bill of lading for goods which had never been put on board, is not to be considered the agent of the owner in that behalf so as to make the latter responsible to an indorsee of the bill for value. That decision settled the law in England. It has been followed in many cases in which, in extension of the same principle, it has been held that a bill of lading so signed is not conclusive against the owner as to the *quantity* of goods or cargo shipped. Among the recent cases on the subject is that of *Jessel v. Bath*, L. R., 2 Exch. 267, from which we learn that Parliament, in legislating in the matter, has gone no further than to enact 'that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, against the *master or other person signing the same*, notwithstanding that such goods or some part thereof may not have been so shipped.' This act leaves untouched the principle and rule of law before stated, which has been thus firmly settled by the courts, and the vast maritime commerce of England has been, and is to this day, conducted subject to, and in recognition of, that rule. *Brown v. Powell Duffryn Steam Coal Co.*, L. R., 10 C. P. 562. In this country the Supreme Court of the United States in *Schooner Freeman v. Buckingham*, 18 How. 182, adopting the case of *Grant v. Norway*, have decided that neither the

owner nor the vessel is responsible to an innocent purchaser or holder of a bill of lading, signed by the master for goods not actually shipped *and intended as an instrument of fraud*. They place their decision, as respects the non-liability of the owner, upon the ground of *want of authority* in the master, who, they say, 'has no more an apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for *cargo actually shipped*, and he has also authority to sign a bill of sale of the ship, when in case of disaster his power of sale arises; but the authority in *each case* arises out of, and depends on a particular state of facts; it is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, *even in favor of an innocent purchaser*, if the facts upon which his power depended did not exist; *and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends*.' So in other courts, where the question was directly presented, the same rulings have been made. \* \* \* We have in fact been referred to no case either in this country or in England (nor have we found any) in which a contrary decision has been made when the question was *necessarily and directly* raised for adjudication. We take it therefore that this doctrine is too well grounded in the commercial jurisprudence of both countries to be longer open to question or doubt."

3. The same doctrine was held in *Black v. Wilmington, etc.*, R. Co., 92 N. C. 42; S. C. 53 Am. Rep. 450 (1885.) The court said: "'Except as against a *bona fide* transferee of the bills of lading for value,' remarks a recent writer, 'the carrier may contradict it as to the delivery to him of the goods, or as to their description, quality or condition.' Abb. Trial Ev. 573, sec. 45. Carrying the rule still further, Mr. Daniel, in his excellent work on Negotiable Instruments, vol. 2, sec. 1733, states it thus: 'Although the bill of lading is signed by the master of the ship, his subscription is as agent for the owners, and the contract is binding upon them. But the master has no authority to grant a bill of lading unless the goods be actually received on board the ship, and if he transcends his authority in this respect, and the goods be not on board, the ship-owners will not be bound by the

bill, although it be transferred to a *bona fide* indorsee for value.’\* So it is said by the Supreme Court of the United States that the general owner is not ‘estopped from showing the real character of the transaction by the fact that libellants advanced money upon the faith of bills of lading.’ *Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. 7. In like manner Mr. Justice Davis, delivering the opinion of the court in the *Lady Franklin*, 8 Wall. 327, and reiterating the doctrine, says: ‘The attempt made in the prosecution of this libel, to charge this vessel for the non-delivery of a cargo which she never received and therefore could not deliver because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here.’ He adds: ‘In this case the bill of lading acknowledges the receipt of so much flour and is *prima facie* evidence of the fact. It is however not conclusive on this point, but may be contradicted by oral testimony.’ Upon similar grounds are the rulings in this court which declare written acknowledgments of money received liable to contradiction by parol proof when no contract is formed by them, as in *Brown v. Brooks*, 7 Jones, L. 93; *Smith v. Brown*, 3 Hawks, 580, and other cases. When no goods are placed in custody of the carrier’s agent to transport, there is no subject-matter to support a contract, and hence no obligation is imposed by the receipt put in the form of a contract. There can be no conveyance unless there be something to convey, and therefore no breach of obligation or duty.”

4. The question is quite elaborately considered, both upon principle and authority, in *National Bank v. Chicago, etc. R. Co.* (1890), 44 Minn. 224; S. C. 20 Am. St. Rep. 566, where the court observe: “It only remains to consider, in the Bank Cases, the effect of the bills of lading upon the liability of the railway companies to the bank, in case no wheat was in fact ever delivered to them for transportation. Of course if the wheat was delivered by the elevator company to Moak & Co., and by the latter to the railway companies for transportation, and the agent of the railway companies in good faith issued the bills of lading, the railway companies would not be liable, for it is always a good

\* In Mr. Daniel’s last edition, the last sentence is preceded by the words, after “But” “According to the English authorities, and to the weight and general current of the American authorities also.” His own opinion, as will be seen later, appeared to be the contrary.



defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title, as was the title of the elevator company in this case as unpaid vendor. A carrier, in issuing a bill of lading for property delivered to him for transportation, does not warrant the title of the shipper. But what is the rule where no property was ever delivered at all for transportation, and the agent of the carrier, either fraudulently or through mistake or negligence, issues a false bill of lading, which passes into the hands of a *bona fide* consignee or indorsee for value? There is an unbroken line of authorities in England that, even as against a *bona fide* consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation. *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 id. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Brown v. Coal Co.*, L. R. 10 C. P. 562; *McLean v. Fleming*, L. R., 2; S. C. App. 128; *Cox v. Bruce*, 18 Q. B. Div. 147; *Meyer v. Dresser*, 16 C. B. (N. S.) 646; *Jessel v. Bath*, L. R., 2 Exch. 267. And this has not been at all changed by the 'Bills of Lading Act.' 18 & 19 Vict., chap. 111, § 3. It is also the settled doctrine of the Federal courts. *The Freeman v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7; *Railway Co. v. Knight*, 122 id. 79; *Friedlander v. Railway Co.*, 130 id. 416. What was said on the subject in *The Freeman v. Buckingham* was probably *obiter*, for in that case it was sought to hold the interests of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, J., and also because so often quoted with approval by the same court in subsequent cases. The case of *The Lady Franklin* did not involve the question of a *bona fide* purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. But in view of the latter cases cited above, there is no room to doubt that that court is firmly committed to the doctrine in its broadest scope. The same rule obtains in Massachusetts, Maryland, Louisiana, Missouri, North Carolina, and apparently Ohio. *Sears v. Wingate*, 3 Allen, 103; *Railway Co. v. Wilkens*, 44 Md. 11; *Fellows v. The Powell*, 16 La. Ann. 316; *Hunt v. Railway Co.*, 29 id. 446; *Bank v. Laveille*, 52 Mo. 380;

Williams v. Railway Co. 93 N. C. 42; Dean v. King, 22 Ohio St. 118. The text-writers all agree that the overwhelming weight of authority is on this side. See 38 Am. Dec. 410 (note to Chandler v. Sprague.) The reasoning by which this doctrine is usually supported is, that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority—i. e., the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being, that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. The only states that we have found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois and perhaps Pennsylvania. Armour v. Railway Co, 65 N. Y. 111; Bank of Batavia v. New York, etc., R. Co., 106 id. 195; Sioux City, etc., R. Co. v. First Nat. Bank, 10 Neb. 556; Railway Co. v. Larned, 103 Ill. 293; Brooke v. Railroad Co. 108 Penn. St. 529. The reasoning of these cases is, in substance, that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that where a principal has clothed an agent with power to do an act

in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. This rule this court in effect adopted and applied in *McCord v. Telegraph Co.*, 39 Minn. 181. It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as *quasi* negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact. If the question was *res integra*, we confess that it seems to us that this argument would be very cogent. But on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property, and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents is to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconveniences resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the Federal courts refuse to follow the decisions of the State courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the State courts should conform

to the doctrine of the Federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same State, one in the Federal courts and another in the State courts, is of itself almost a sufficient reason why we should adopt the doctrine of the Federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference therefore to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of the law of agency, we deem it best to hold that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake."

5. In *Pollard v. Vinton*, 105 U. S. 7, Mr. Justice Miller makes a faint attempt to distinguish the case of corporations, whose "officers are the corporation for many purposes," and who defraud the corporation and the parties with whom they deal. This is in respect to *N. Y. etc. R. Co. v. Schuyler*, 34 N. Y. 30.

*Contrary authority:* The contrary cases proceed upon the theory that the act is within the apparent scope of the agent's authority; that the principal is estopped; that public policy and freedom of trade demand such an interpretation; and that where one of two innocent parties must suffer by a fraudulent act, he should suffer whose conduct empowered the wrong-doer to perform the act.

1. The leading case to the contrary is *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111; S. C. 22 Am. Rep. 603 (A. D. 1875), in the Commission of Appeals. There defendant's agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, gave M. bills of lading for the goods mentioned in the receipt, knowing that he intended to raise money on the bills, and plaintiff advanced money to M. upon the security of the bills. *Held*, that the defendants were bound by their agent's acts and estopped from denying the receipt of the goods. The court, by Dwight, Commissioner, said: "The defendant insists that Street could not bind it by issuing fictitious or non-representative bills of lading. It claims that his authority

was confined to bills for goods actually within its control. It cites, to this effect, *Grant v. Norway*, 10 Com. Bench, 665; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182. *Grant v. Norway* has been subject to much and severe criticism, as being adverse to the general view prevailing in the courts of this State, where confidence has been reposed in an agent and an apparent authority conferred upon him, that the principal must suffer from an actual exercise of authority not exceeding the appearance of that which is granted. When one of the two innocent persons must suffer in such a case, that person must bear the loss who reposed the confidence. So far as *Grant v. Norway* stands in the way of this doctrine, it must be deemed to be overruled. Remarks of Davis, J., in *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 73. *Grant v. Norway*, however, is not precisely parallel with the present case. In that case the bill of lading was issued to a party who knew that the bill of lading was issued by an agent without authority, and was then transferred to a purchaser acting in good faith. It may accordingly be said with plausibility that the representation was not made to the assignee, who simply acquired the title of the fraudulent consignee. It would have resembled the case at bar if the plaintiffs had known of the forgery of Michaels when they took the bills of lading, and had then transferred them to persons paying value and acting in good faith. The case would then have been governed by the rule that an assignee of a thing in action must abide by the case of him of whom he buys. Remarks of Selden, J., in *Griswold v. Haven*, 25 N. Y. 604-606. Street, having power to issue bills direct to consignees for goods actually in the possession of the defendant, and the present bills being in no ways distinguishable in form from those which were usually employed, he must be considered as having the necessary authority as to the plaintiffs acting in good faith. The only remaining point under this branch of the case is, whether the defendant is not estopped by the statements in the bill of lading from denying that it had sufficient lard secured from Michaels to comply with its terms. The defendant's agent was informed by Michaels that the bills were to be used at bank on the same day. They were issued with the expectation that they would be acted upon by bankers or other capitalists. It cannot complain if the bills accomplished the purpose for which they were designed. The representations in the bills were made to any one who, in the course of business, might think fit to make advances on the

faith of them. There is thus present every element necessary to constitute a case of estoppel *in pais*, a representation made with the knowledge that it might be acted upon, and subsequent action upon the faith of it to such an extent that it would injure the plaintiffs if the representation was not made good. It is now well settled that fraud is not necessary to constitute a case of estoppel. Though the defendant was induced by the fraud or mistake of Michaels to issue these bills, that is immaterial. Its liability depends on the fact that, no matter what its inducements may have been, it has made certain representations upon which the plaintiffs have advanced their money in good faith. If the defendant placed undue confidence in Michaels, it is but the familiar case of imposing the burden upon him who unwisely or unguardedly reposed the confidence. *Brown v. Bowen*, 30 N. Y. 519; *Manufacturers and Traders' Bank v. Hazard*, id. 226; *Shapley v. Abbott*, 42 id. 443; *Rawls v. Deshler*, 4 Abb. Ct. App. Dec. 12. The principle governing the present case was announced in the case of *Griswold v. Haven*, 25 N. Y. 595. It there appeared that the defendants, John Wright & Co., issued receipts representing that they had in store, on account of Ford & Son, a quantity of grain. One of the defendants went with one of the firm of Ford & Co. to the plaintiff, and in reply to an inquiry from the plaintiff, stated that the grain was in good order and all right. It was held that the plaintiff having made advances on the faith of the statement, the defendants were bound by the act of their agent, and were estopped from denying that they had the grain in store. The difference in facts between this case and the one at bar makes no difference in principle. In the one case the statement was oral, in the other it was written. Both cases have the important and leading element that the agent knew that the statement was to be acted upon." Earl, C., dissented.

2. This doctrine was reiterated, unanimously, in *Bank of Batavia v. N. Y., etc. R. Co.*, 106 N. Y. 195; S. C. 60 Am. Rep. 440. The court said, by Finch, J.: "It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is of itself a representation, a third person, dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the prin-

cial is estopped from denying its truth to his prejudice. A discussion of that doctrine is no longer permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. \* \* \* While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another, and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary he is bound by law to recognize the validity of transfers, and to deliver the property only upon the production and cancellation of the bill of lading. If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as 'non-negotiable.' \* \* \* If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfer of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house and examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

3. This doctrine was adopted in *Sioux City, etc., R. Co. v. First Nat. Bank*, 10 Neb. 556; S. C. 35 Am. Rep. 488 (A. D. 1880). The court said: "In the case of *Grant v. Norway*, 2 Eng. Law and Eq. 337, it was held that the master of a ship has no general authority to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on

board. This case was decided in the Common Pleas in 1851. No authorities are cited by the court to sustain its position, the court saying: 'There is but little to be found in the books on this subject; it was discussed in the case of Berkley v. Watling, 7 Ad. & El. 29; but that case was decided on another point, although Littledale, J., said in his opinion the bill of lading was not conclusive under similar circumstances on the ship-owner.' This decision was followed in Hubbersty v. Ward, 8 Exch. 330, in the Court of Exchequer, Pollock, C. B., placing the decision upon a lack of power in the master. See also Coleman v. Riches, 16 C. B. 104. These decisions were followed by the Supreme Court of the United States in the case of the schooner Freeman v. Buckingham, 18 How. 182. In that case the claimant, being the sole owner of the schooner named, contracted with one John Holmes to sell it to him for the sum of \$10,000, payable by installments at different dates. By the terms of the contract John Holmes was to take possession of the vessel, and if he should make all the agreed payments, the claimant was to convey to him. The vessel was delivered to Holmes under this contract and he had paid one installment, the only one which had become due. Holmes permitted his son, Sylvanus Holmes, to have the entire control and management of the vessel and to appoint the master. Sylvanus Holmes transacted business under the style of S. Holmes & Co., and the flour mentioned in the bills of lading as having been shipped by him was never in fact shipped, the master having been induced to sign the bills of lading by fraud and imposition. The question before the court is thus stated in the opinion: 'But the real question is, whether in favor of a *bona fide* holder of such bills of lading procured from the master by the fraud of an owner *pro hac vice*, the general owner is estopped to show the truth, as undoubtedly the special owner would be.' It was held that the maritime law gave no lien upon the vessel, and that the general owner thereof was not estopped from alleging and proving the facts. In the case of Dean v. King, 22 Ohio St. 118, it was held in an action by the shipper against the owner of a steamboat engaged in the business of common carriers, to recover for goods as per bill of lading, that the defendants are liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account. This seems to have been an action between the original parties. In Dickerson v. Seelye, 12 Barb. 99, the court held that as be-



tween the shipper of the goods and the owner of the vessel, a bill of lading may be explained as to the quantity and condition of the goods, yet it cannot be so explained as between the owner of the vessel and a consignee or assignee of the bill of lading who has in good faith advanced money on the strength of it, and has thus been induced by the master's signing the bill to do an act changing the situation of the parties. In such case the bill of lading is conclusive on the owner in respect to the quantity of goods. The court say: 'As between the owner of a vessel and an assignee for a valuable consideration paid on the strength of the bill of lading, it may not be explained. *Portland Bank v. Stubbs*, 6 Mass., 422; 4 Am. Dec. 151; *Abb. on Shipping*, 323-4; *Bradstreet v. Lees*, MS., U. S. Dist. Ct. In such case the superior equity is with the *bona fide* assignee, who has parted with his money on the strength of the bill of lading.' \* \* \* In the case of the *Savings Bank v. A. T. & S. F. R. Co.*, 20 Kans. 519, the court held that where the agent of a railroad company has authority to receive grain for shipment over its road, and issue in the name of the name of the corporation a bill of lading for each consignment received, and issues two original bills of lading for a single consignment, the two bills of lading having been assigned to the bank, which advanced money thereon in good faith, and the shipper being insolvent and having absconded, the railway company was estopped by its statement and promise in the bill of lading to deny that it has received the grain mentioned therein. The court say: 'The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to the railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant or consignee against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading and without further inquiry the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to repurchase other shipments. In this way the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may buy for cash and ship grain valued at many thousands. This mode of transacting business

is greatly advantageous both to the shipper and the producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases shipments to the markets. A mode of doing business so beneficial to so many classes ought to receive the favoring recognition of the courts to aid its continuance.' The question whether or not bills of lading are negotiable does not enter into the case. All the testimony shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and that he not only had authority to issue such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills it will not do to say that the agent had authority to issue bills of lading duly signed only in cases where shipments were made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading, and when duly issued they are not the bills of the agent but of the railroad company. The representation therefore thus made in the bills that the company has received a certain quantity of grain for shipment, is a representation to any one, who, in good faith relying thereon, sees fit to make advances on the same. If these representations are false, who should bear the loss? The party who appointed, placed confidence in, and gave authority to make the bills, or the one that in good faith, relying thereon, purchased or advanced money on the same? In *Lickbarrow v. Mason*, 2 T. R., 63 (1 Smith Lead. Cas., 6 Am. ed. 1044), Ashurst, J., says: 'We may lay it down as a broad, general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled said third person to occasion the loss must sustain it.' This case presents every element necessary to constitute an estoppel *in pais*, a representation made with full knowledge that it might be acted upon, and subsequent action in reliance thereon by which the defendants in error would lose the amount advanced if the representation is not made good. This principle was entirely overlooked in *Grant v. Norway*, and the cases following it."

4. To the contrary also is *Brooke v. N. Y., etc.*, R. Co. 108 Pa.

St. 529 (1885). Here the shipping clerk fraudulently issued a fictitious bill of lading, but the company was held estopped as to one who in good faith made advance on the credit of it. The court said: "Plaintiffs, who thus became the innocent victims of the fraud to the extent of several hundred dollars, claim that defendant, through whose shipping agent they were defrauded, should make good the loss. The claim appears to be both reasonable and just; and notwithstanding the authorities cited in support of the opposite view, we are satisfied it is so. Under the circumstances cited in the case stated, defendant is estopped from denying what its accredited shipping agent asserted in the bill of lading by which plaintiffs, without any fault on their part, were misled to their injury. A question has been raised as to whether, upon the facts presented, the law of this State or that of New York should govern in determining defendant's liability. We are not prepared to admit there is any material difference between the laws of the two States, applicable to the case, but if there is, we think it very clear that the law of New York must control, for the reason that the transaction took place in that State. The present case is virtually ruled by *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111; S. C. 22 Am. Rep. 603. The facts of that case, as stated in the opinion of the court, are not distinguishable in principle from those of the case before us. The same principle is recognized in *Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776, the facts of which were briefly these: The railroad company received a consignment of wheat, and issued therefor a delivery order which came into the hands of B., who obtained advances thereon from plaintiffs. Shortly afterward the company issued a second delivery order in respect of the same consignment of wheat. The two orders were different, and such as might be reasonably supposed to relate to distinct consignments. On the second order B. obtained further advances from plaintiffs, who were under the belief that the delivery orders related to distinct consignments. B. having afterwards become insolvent, it was held that the company was estopped by the negligence of its agent from showing that the two delivery orders related only to one consignment, and that it was liable to compensate plaintiffs for the loss sustained by them through their advances to B. It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein had actually been given by the railroad company to Weiss, it was

not in any manner responsible for his unauthorized act, even as to innocent third parties who were misled and injured thereby. We cannot assent to this proposition. As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested, but as between the principal and the agent, the true limit is the express authority of instruction given to the agent. *Evans Agency*, 594, 606; *Adams Express Co. v. Schlessinger*, 75 Penn. St. 246. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions; and this is expressly the case with officers and agents of corporations. Since a corporation acts only through agents, it is bound by its agent's contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority. *Whart. Cont. secs. 96, 130, 269*. The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent. *Evans Agency*, 193, note. These elementary principles are founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in that matter, should be bound by it. *Evans Agency*, 591. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods, but it puts Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule."

5, Recognizing the same principle, in *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293 (1882), it was held that as against the bill of lading, the carrier could not show that at the time of its issue and indorsement the goods were in the adverse possession of another, so as to defeat the action of the consignee who advanced money on the bill of lading. The court said: "It presents a clear case requiring the application of an estoppel."

6. So in *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293; *S. C.* 54 Am. Rep. 319, it was held that a railway company, whose

baggage man accepts baggage from a passenger before his purchase of a ticket, contrary to the rules of the company, is liable for its loss without regard to that fact.

This notable conflict of authority has been the subject of considerable recent comment by text-book writers and reviewers. Mr. Jeremiah Travis (Law of Sales and Collateral Subjects), devotes the first seventy pages of his second volume to an exhaustive and detailed examination of the cases, giving his adhesion to the English doctrine; but his treatment of the contrary cases, and especially of the *Armour* case, is so intemperate and violent, and there is so little consecutive argument of the question on principle in his remarks, that it is impracticable to quote from them with any advantage or instruction.\*

Mr. Daniel (Neg. Inst. vol. 2, § 1733*a*, 4th ed.), says: "The master of a ship is generally separated from his principals, and beyond their supervision and control. Roving the seas in commercial enterprises, and often thousands of miles apart from those who trust him, the policy of the law might well shield his principals from responsibilities, which were he in a position under their inspection, and subject to their superintendence, it might withhold. And in respect to railroad corporations, express companies and other carriers by land, whose agents are within view of superior officers, and subject to speedy removal for delinquencies, it might well be contended that their shipping agents, when acting within the apparent scope of authority, would bind their principals, although in the particular case violating actual authority and committing a breach of trust. These do not appear to be the grounds of dissent from the doctrines heretofore stated in the text."

Mr. Mechem says (Agency, § 717), "the doctrine of the New York court seems most consonant with reason and justice."

Mr. Freeman says (note, 38 Am. Dec. 411): "It is no doubt true that a ship-owner never gives authority to the master to issue a bill of lading for goods which have never been received on board the vessel; but it is also true that the master has general authority to issue bills of lading upon goods, and that when he signs such a document, it being within the scope of his apparent

\* The writer's use of such adjectives and expressions as "pernicious," "slang," "arrant nonsense," "misty comprehension," "merest tyro," "unmitigated nonsense," "ridiculous," "disingenuous," "palpable absurdity," "utter absurdity," "simply absurd," "grossly wrong," "vicious," "silliness," will justify this characterization of his criticisms.

authority, those receiving the document have a right to presume that it represents an actual shipment of goods. This is the legal presumption upon the face of the instrument, without extraneous proof. In other words, it is *prima facie* or presumptive evidence of a shipment. It has never been held necessary to show affirmatively, by other evidence, that goods of the kind and quantity mentioned were shipped, before introducing a bill of lading. But if the document itself is not on the face of it evidence of a shipment, and therefore of the master's authority to issue a bill of lading for the goods, independent preliminary proof of those facts would in every case be required. If then a bill of lading is *prima facie* evidence that the goods have been shipped, and therefore that the issuance of the instrument was authorized, it is not in accordance with established legal principles that the consignee or indorsee, who in good faith parts with his money upon the credit of the *prima facie* case so made, should be preferred to the ship-owner who has put it into the power of the master to make that *prima facie* case? \* \* \* Besides, how much more reasonable it is to throw the risk as to whether the goods represented by a bill of lading have been actually shipped or not, upon the ship-owner, who presumably knows the master's character and business habits, and can, if he chooses, exercise a constant surveillance over him, rather than upon the consignee or indorsee at a distance from the place of shipment, who is perhaps unacquainted with the master, and has no means of knowing whether he has received the goods for shipment or not. \* \* \* Although the great weight of authority, as already stated, is unquestionably in favor of the doctrine that the ship-owner is not estopped, in such a case, to deny the shipment of the goods as against a *bona fide* consignee or indorsee, it seems to us that the decisions holding the opposite view are based upon the sounder reason."

A reviewer in 23 Am. Law Rev. 672, says: "In the case of *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416, the Supreme Court of the United States has again affirmed the senseless and unjust doctrine that if the agent of a common carrier, in order to make some money for himself, conspires with a shipper to issue fraudulent bills of lading, against which drafts are drawn and money procured from innocent persons, who take them in the ordinary and well-known course of commerce, the carrier cannot be held to make good the money which the consignee or banker has thus advanced upon the faith of the honesty of the carrier's

agent and the goodness of the bill of lading, but the only recourse of the person defrauded is against those who committed the fraud. The theory on which this case, and the line of cases which it follows, proceeds is, that the agent was not put there to commit such frauds; that as he committed the particular fraud for his own gain, and not for the gain of his principal, the act is to be deemed as not within the scope of his agency in the sense which makes his principal liable. This reasoning is specious, and that is all that can be said in favor of it. We have met with no case where it has been better stated than is the following language of Mr. Chief Justice Fuller in the case on which we are commenting:

“It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents, except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the action maintainable on the ground of tort.’

“It is true that the agent commits the fraud, not to effect a supposed purpose of his principal, but to effect some purpose of his own; and although this furnishes the usual test by which to determine whether the rule of *respondeat superior* is to apply, it is by no means an universal test. The courts constantly act upon the contrary principle, in dealing with the acts of agents of corporations and of individuals. A bank teller, with the aid of an

outside confederate, certifies checks as being good when there are no funds on deposit in the bank to meet the checks. The object of the teller is not to effect any purpose of the bank, but to steal some money for himself or to cover up some previous theft. The check passes into the hands of a *bona fide* holder for value. Has it ever been supposed that the bank is not liable to pay for it, although it has no funds of its drawer on hand with which to meet it? The managing officers of a private corporation make a fraudulent over-issue of its shares and put them upon the market, and they get into the hands of innocent purchasers. Although the question here presented has been the subject of a great forensic struggle and of a most elaborate examination, it has resulted in holding that the corporation must make good the shares in the form of damages. *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 618. The principle is one of the most obvious sense and justice. The teller is appointed to certify checks. The president and secretary of the corporation are appointed to issue certificates of its stock. The station agent of the railway company is appointed to sign and issue bills of lading. In all these cases the paper which is issued, being either negotiable or *quasi-negotiable*, passes in the ordinary course of business into the hands of innocent men who advance their money upon it. Shall it be said that one who thus advances his money is to take the risk of the honesty of the agent by whose hand the instrument has been issued and signed, or shall the principal be required in dealings of this kind with the general public, to warrant the fidelity of his own agent? There cannot be two answers to this question among business men. The fact that the courts have answered it, in the case of the agent of the carrier, in the wrong way, and contrary to the way in which they have answered it in the other cases, is an illustration of the chief infirmity of our judicial system. That infirmity lies in the fact that our judges in the previous professional work of their lives have been engaged half the time in favor of the wrong; so that however honest and upright they may be as men, when they come to the technical work of their profession, their mental processes reason as assiduously in favor of the wrong as in favor of the right. Traveling on technical lines, they are absolutely indifferent to justice. The rule on which we are now commenting and which has now been reaffirmed by the Supreme Court of the



United States for the second time, originated in a stupid<sup>1</sup> conception of the English judges. *Grant v. Norway*, 10 Com. Bench, 665. It has been denied in the Court of Appeals of New York, on reasons which have not been, and which cannot be, answered. *Armour v. Michigan Central R. Co.*, 65 N. Y. 111; 22 Am. Rep. 603.

"Look at it in a practical way. It is absolutely impossible for a banker advancing money on the security of a bill of lading signed by a known agent of a railway or other carrier, to know whether the goods have actually been received for which the bill of lading is issued, or not. He is absolutely helpless in the face of such a fraud, unless the agent is sufficiently solvent to answer to him for it, which it may safely be said is never the case. The decision is not only absurd and unjust, but the perpetuation of such a rule is a great injury to commerce. Under the operation of this rule, the bankers of the country are every day advancing vast sums of money, theoretically on the collateral security of personal property in the hands of railway carriers represented by bills of lading, but actually on the honesty of some thousands of railway station agents scattered all over the country. In dealing with such a question, judges cannot shut their eyes to the known habit of commerce in advancing money upon such a security; and that court has more than once held that this is the subject of judicial notice. In view of this habit, the true view is that every bill of lading is a representation to the public by the carrier that he has the goods; and if the agent of the carrier, albeit to accomplish some purpose of his own, issues the bill of lading in the name of the carrier when he has not received the goods, has not the carrier, who appointed the agent and authorized him to make such representations generally, made a false representation to the public? And if so, why should he not answer for the consequences? The truth is that the decision is not only destitute of justice and of commercial expediency, but the legal reasons on which it proceeds are too stupid for argument.

"The sound principle which should govern all such cases was stated by Davis, J., in giving the opinion of the New York Court of Appeals, where the question related to the liability of a corporation for a fraudulent over-issue of its shares: 'Where the principal has clothed his agent with power to do an act upon the

<sup>1</sup> This is perilously near Mr. Travis' robust style of criticism.

existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying the representation to his prejudice.' New York, etc., R. Co., v. Schuyler, 34 N. Y. 30, 73. And where the instrument which embodies the representation takes the form of a *quasi*-negotiable security, like a bill of lading, in which the business community are accustomed to deal, and on which the banking community are accustomed to advance money, it can make no difference in principle whether the party deceived by the bill has dealt directly with the agent, or indirectly through other parties."

It seems to me that the doctrine of the Armour case is right, for the reason that the act of the agent in signing the bill is within the apparent scope of his authority, and third persons are not bound to inquire whether he has not possibly exceeded his authority. Such persons have a right to rely on his performance of what is usual and fair in such relations, and are not bound to suspect that there may have been something unusual and fraudulent. It is said that it is not within the agent's apparent scope of authority to sign for goods not received, but only for goods received. That is the very reason why third parties, when he signs, have the right to assume that it is for goods received. The apparent scope is the usual, not the unusual, and it is the appearance, in this class of cases, to the community, who do not know the facts, and not the appearance to the immediate parties, who do know them, that should control. The usual implication derivable from the bill of lading is that it was signed for goods actually received; it is extremely unusual that it is signed for goods not received, and the party giving up his money on the faith of it may safely rely on the usual implication and need not inquire into a possible and unusual departure from the common practice. The court in *Grant v. Norway* say: "The very nature of a bill of lading shows that it ought not to be signed until the goods are on board, for it begins by describing them as *shipped*." So when the bill of lading comes signed to the third party, describing the goods as *shipped*, it is a fair warrant to him that the master has pursued the usual course, and has signed the bill on receipt of the goods, and it is not notice to him

that the goods may not have been received, and that he must inquire at his peril. It is frequently said that "the master has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship." But the one is frequent, the other exceptional; the latter puts the party on guard, the other does not. It is said also that "without such a delivery there was no contract of carrying." But this is merely begging the question. If the goods were afterward supplied the contract certainly would arise, and it is a mere question of reasonable appearances. Bills of lading play a great part in modern business, and are universally relied on as an easy means of transferring the title to property in transportation to distant points and vesting it in strangers, and if it were once understood that the evidence which they carry on their face is only *prima facie*, and that the carrier may rebut it by showing that he never had the goods for which his agent authorized to sign such bills has signed, it would create great inconvenience and fill the business community with distrust. No trader or bank at a distance, across the ocean or the continent, could feel any security in advancing money on such documents without inquiry, and inquiry would frequently be impracticable. The motto in the premises should not be, let the consignee or indorsee beware of the statement of the bill, but rather, let the carrier beware of his agent's want of integrity and carefulness in putting the false bill afloat.

### Sec. 108. Contract collateral or supplementary.

Parol evidence is competent to show a contract collateral or supplementary to the bill of lading.

It is universally held that so far as the bill of lading constitutes a contract and not a mere receipt, it may not be contradicted by parol; but in Pennsylvania it has been held, that where a bill of lading simply undertakes to deliver the goods, it may be shown by parol that the carrier agreed to insure against inevitable accidents, to repel the implication of the condition to the contrary usually raised by the law in such cases.<sup>1</sup> So it is admissible to prove an oral agreement to carry to a point beyond the destination specified in the bill of lading.<sup>2</sup> So to prove an oral agree-

<sup>1</sup> *Morrison v. Davis*, 20 Pa. St. 171; S. C. 57 Am. Dec. 695.

*Malpas v. London, etc. Co.*, L. R. 1 C. P. 336.

<sup>2</sup> *Baltimore, etc. Co. v. Brown*, 54 Pa. St. 77.

ment to carry at non-valuation rates.<sup>1</sup> So to transport to a point beyond that named in the writing.<sup>2</sup>

### Sec. 109. Non-assent to stipulations.

Parol evidence is competent to show that the shipper did not assent to stipulations in the receipt or bill of lading.<sup>3</sup>

But delay in ascertaining and objecting to the stipulations is fatal.<sup>4</sup>

### Sec. 110. Releases.

Parol evidence is inadmissible to contradict a formal release or to add conditions or make exceptions to it.

So of a sealed release.<sup>5</sup> So of a release indorsed on a bond.<sup>6</sup> So of a receipt on a settlement, expressed to be "in full of all debts, dues and demands to date."<sup>7</sup> In *White v. Richmond, etc., R. Co.* 110 N. C. 456, the plaintiff, a conductor in defendant's employ and injured therein, executed a paper providing, "in consideration of \$6,000, to me in hand paid, \* \* \* [I] do hereby release \* \* \* [defendant] from all claims upon them for damages received by me by a collision, \* \* \* and covenant with them that I will not sue them \* \* \* for damages received in said collision. \* \* \* I hereby release [defendant] \* \* \* from any further liability or care of me on account of said accident." Subsequently plaintiff brought suit, alleging as a further consideration for such release that defendant agreed to keep him in its employ for life, at a stipulated sum per month, and that it, having discharged him, was liable, averring that the release was given with

<sup>1</sup> *Boscowitz v. Adams Ex. Co.* 93 Ill. 523; S. C. 34 Am. Rep. 191.

<sup>2</sup> *Baltimore, etc. Co. v. Brown*, 54 Pa. St. 77.

*Malpas v. London, etc. R. Co., L. R. 1 C. P. 336.*

<sup>3</sup> *Boorman v. Am. Ex. Co.* 21 Wis. 152. *King v. Woodbridge*, 34 Vt. 565.

*Madan v. Sherard*, 73 N. Y. 329; S. C. 29 Am. Rep. 153.

<sup>4</sup> *Germania F. Ins. Co. v. Memphis, etc. R. Co.*, 72 N. Y. 90; S. C. 28 Am. Rep. 113.

*Hill v. Syracuse, etc. R. Co.*, 73 N. Y. 351; S. C. 29 Am. Rep. 163.

*Grace v. Adams*, 100 Mass. 105; S. C. 1 Am. Rep. 131.

*Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181; S. C. 14 Am. Rep. 514.

<sup>5</sup> *Peirson v. Hooker*, 3 Johns. 68; S. C. 3 Am. Dec. 467.

*Brady v. Read*, 94 N. Y. 631.

<sup>6</sup> *Jackson v. Stackhouse*, 1 Cow. 122; S. C. 13 Am. Dec. 514.

<sup>7</sup> *Pratt v. Castle*, — Mich. —; 52 N. W. Rep. 52.

the understanding and agreement that it did not extend to the contract of life employment, "and if of meaning in law to the contrary, it was so expressed unintentionally and by mistake." *Held*, where the evidence of plaintiff alone tended to prove no more than a mistake, that the court properly refused to submit the same to the jury, the complaint containing only a simple allegation of mistake, and there being neither allegation nor evidence that would entitle plaintiff to recover.<sup>1</sup>

<sup>1</sup> See however *Kentucky, etc. Co. v. Cleveland*, — Ind. — ; 30 N. E. Rep. 802, *ante*, p. 141.

## CHAPTER XVIII.

## SUBSCRIPTIONS.

- SEC. 111. Proof of consideration.  
 112. Conditional subscription—when binding.  
 113. Conditional subscription—character of.  
 114. Subscription to stock.

**Sec. 111. Subscriptions.**

A voluntary unsealed subscription for a public or charitable purpose may be avoided by evidence that no expenditure has been made, or liability incurred, on the faith of it,<sup>1</sup> and it may be enforced by proof to the contrary.<sup>2</sup>

*Illustrations:* 1. "On the important question, how far voluntary subscriptions for charitable purposes, as for alms, education, religion, or other public uses, are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as on all points settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established. And the expenses or liabilities need not have been incurred by the plaintiff if others of the subscribers incurred

<sup>1</sup> Trustees v. Stewart, 1 N. Y. 581.

Pratt v. Trustees, 93 Ill. 475; S. C. 34 Am. Rep. 187.

Cottage St. M. Church v. Kendall, 121 Mass. 528; S. C. 23 Am. Rep. 286.

Twenty-third St. Church v. Cornell, 117 N. Y. 601.

White v. Scott, 26 Kans. 476.

Williams v. Rogan, 59 Tex. 438.

Homan v. Steele, 18 Neb. 652.

Wallace v. Townsend, 43 Ohio St. 537; S. C. 54 Am. Rep. 829.

<sup>2</sup> Roberts v. Cobb, 103 N. Y. 600.

Trustees v. Garvey, 53 Ill. 401; S. C. 5 Am. Rep. 51. (Where the trustees had borrowed money on the faith of the subscription).

Philomath College v. Hartless, 6 Oreg. 158; S. C. 25 Am. Rep. 510.

Richmondville Union Sem. v. McDonald, 34 N. Y. 379.

Pres. Soc. v. Beach, 74 N. Y. 72.

Carr v. Bartlett, 72 Me. 120.

Foust v. Board of Pub. 8 Lea, 552.

Des Moines Univ. v. Livingston, 57 Iowa, 307; S. C. 42 Am. Rep. 42.

them on the faith of the defendant's subscription. Further than this it is not easy to go, unless such subscriptions are held to be binding merely on grounds of public policy. To say that they are obligatory, because they are all promises, and the promise of each subscriber is a valid consideration for the promise of every other, seems to be reasoning in a vicious circle. The very question is, are the promises binding; for if not, then they are no consideration for each other. To say that they are binding because they are such considerations, is only to say that they are binding because they are binding; it assumes the very thing in question.<sup>1</sup>

2. "The conclusive objection to the maintenance of this action is the want of consideration for the undertaking of the defendant. This is not a case of mutual promises where the undertaking of one party is the consideration for the promise of the other. *Livingston v. Rogers*, 1 Caines, 583; Chit. Pl. 296. This was so adjudged by the Supreme Court when the case was before them upon demurrer to the declaration. As I read the agreement, there is no engagement whatever upon the part of the plaintiffs, or any other person, to do or forbear to do anything as a consideration for the promise of the defendant. The clauses in the instrument to which we are referred by the counsel for the plaintiffs, are mere conditions limiting the liability of the defendant, or designating the purpose to which his money, when paid, is to be applied. The subscribers say that they will not pay anything unless the sum of \$50,000, including their subscription, shall be invested, and the interest shall be applied to the payment of the salaries of the officers. But the corporation do not undertake that that sum shall be subscribed, or that any other person will *endeavor* to procure subscriptions; or that they will make the investment or appropriate the income of the fund to the purpose designated. The corporation have not executed the agreement, and there is no evidence that they knew of its existence until after the subscription of the defendant." \* \* \*

"There is no *request* by the subscribers that the plaintiffs shall do anything. They agree to pay the trustees of Hamilton College the sums by them severally subscribed, and then add, 'that we shall not be holden to pay the sum subscribed by us, unless the aggregate of our subscriptions and of contributions to this object shall, by the 1st of July, 1834, amount to \$50,000,' etc. The trustees are made, by the subscription, the mere depositaries

<sup>1</sup> 1 Pars. Cont. 453.

of the money, and nothing more. If any other person had been designated, the agreement would have been as effectual for all the purposes contemplated, as in its present form. There certainly is no express request to the plaintiffs, or the trustees as their representatives, to procure subscriptions or contributions. Nor can a request be implied from the agreement. The endowment of the college was, in legal contemplation, no benefit to the subscribers. The public advantage arising from the diffusion of knowledge and the advancement of science, however important in themselves, have not been held a sufficient consideration alone to uphold an agreement of this character. *Bridgewater Academy v. Gilbert*, 2 Pick. 580. We cannot therefore imply a request from the beneficial nature of the services to the subscribers. Nor is it to be inferred from the object to be obtained by the subscription. The purpose, as stated by the plaintiffs in their declaration, 'was to endow the institution, by providing a fund for the payment of its officers.' In effect, it was to add \$50,000 to the permanent funds of the college without abstracting anything from those already accumulated. How then are we authorized to imply a request by the subscribers, that the plaintiffs should, as they allege, 'at great labor and expense,' procure these subscriptions? Every dollar thus expended required an equivalent sum to be raised, in order to put the institution upon the footing contemplated by the subscribers."<sup>1</sup>

3. "The performance of gratuitous promises depends wholly upon the good-will which prompted them, and will not be enforced by the law. The general rule is, that in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. *Exchange Bank v. Rice*, 107 Mass. 37; S. C. 9 Am. Rep. 1. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made.

"A promise to pay money to promote the objects for which a corporation is established falls within the general rule. In every case in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting

<sup>1</sup> *Trustees v. Stewart*, 1 N. Y. 581.



a building, in accordance with the terms of the contract, and upon the faith of the defendant's promise." \* \* \*

"Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward. *Freeman v. Boston*, 5 Metc. 56; *Loring v. Boston*, 7 id. 409; *Carr v. National Security Bank*, 107 Mass. 45, 48; S. C. 9 Am. Rep. 6, 9.

"The suggestion in *Trustees v. Stetson*, 5 Pick. 508, substantially repeated in *Ives v. Sterling*, 6 Metc. 316, and in *Watkins v. Eames*, 9 Cush. 539, that 'it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant,' was in each case but *obiter dictum*, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him."<sup>1</sup>

4. "At first view it would seem that when a person signs his name to a promise to pay money, or to convey property to an institution of learning, the public advantage and the fact that others have been induced by their reliance upon his co-operation to give their money and property to the same object ought to be a sufficient consideration; but the courts, acting upon the principle that every promise to be enforced must have a good or valuable consideration to uphold it, have held that something more than the naked promise to give is necessary, and that the public advantage is not of itself a sufficient consideration to support a promise. *Trustees v. Stewart*, 1 N. Y. 581; *Howard v. Williams*, 2 Pick. 80. Yet while the courts rather than violate an old and established rule of law hold that a naked promise to pay money for a public object cannot be enforced for the want of a consideration, they have also decided with great unanimity, that if the promise itself, or any other promise, upon which it is founded, contains a request, or that which by any fair construction can be

<sup>1</sup> Cottage St., etc., *Church v. Kendall*, 121 Mass. 528; S. C. 23 Am. Rep. 286. (See note on this case, by Edmund H. Bennett, 16 Am. L. Reg. N. S. 548.)

construed as a request to the trustees, or others representing the institution for whose benefit the promise is made, to do any act, or to incur any expense, or to undergo any inconvenience, and such institution does the act, or incurs the expense, or submits to the inconvenience, this request and performance on the behalf of the institution is a sufficient consideration to support the promise."<sup>1</sup>

5. In *Presbyterian Church v. Cooper*, 112 N. Y. 517, the court said: "Where defendant's intestate signed a subscription paper by which the signers agreed to pay to the trustees of plaintiff church the amount set opposite their names on condition that a certain fixed sum was subscribed, the fact that other persons signed such subscription on the faith of the signature of the decedent constituted no consideration for the promise of the latter as between him and the payee. And the fact that the trustees made efforts to secure subscriptions in order to fulfill the conditions upon which the liability of the subscribers depended, but merely as individuals, and not because of any request by the decedent, constituted no consideration for his promise. It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise would not in a legal sense be beneficial to the promisors entering into the engagement. This seems to have been the view of the chancellor, as expressed in the *Hamilton College* case when it was before the Court of Errors (2 Den. 417), and *dicta* of the judges will be found to the same effect in other cases. *Trustees v. Stetson*, 5 Pick. 508; *Watkins v. Eames*, 9 Cush. 537. But the doctrine of the chancellor, as we understand, was repudiated when the *Hamilton College* case came before this court (1 N. Y. 581), as have been also the *dicta* in the *Massachusetts* case, by the court in that State, in the recent case of *Church v. Kendall*, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to

<sup>1</sup> *Philomath College v. Hartless*, 6 Oreg. 158; S. C. 25 Am. Rep. 510.

carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises as between the plaintiff and defendant. If any action would lie at all, it would be one between the promissors for breach of contract. In the disposition therefore of this case we must reject the consideration recited in the subscription paper as ground for supporting the promise of the defendant's intestate—the money consideration—because it had no basis in fact, and the mutual promise between the subscribers, because as to their promises there is no privity of contract between the plaintiff and the promisors. Some consideration must therefore be found other than that expressly stated in the subscription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services rendered by one party at the request of another would constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view. Leaving out of the subscription paper the affirmative statement of the consideration (which for reasons stated may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in the *Hamilton College* case, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage

that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment in case they accepted the money would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money paid on subscriptions upon the mortgage debt did not constitute a consideration for the promise of the defendant's intestate. We are unable to distinguish this case in principle from the Hamilton College case, 1 N. Y. 581. There is nothing that can be urged to sustain the subscription that could not with equal force have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription and resisted the balance. In both part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College case (which in that respect is unlike the present one) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown also that professors had been employed upon the strength of the fund subscribed. The Hamilton College case is a controlling authority in this case. It has not been overruled, and has been frequently cited with approval in the courts of this and other States. The cases of Barnes v. Perine, 12 N. Y. 18, and Roberts v. Cobb, 103 id. 600, are not in conflict with the decision in the Hamilton College case. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service, or incur liabilities, on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in Barnes v. Perine, said 'the request and promise were to every legal effect simultaneous;' and he

expressly disclaims any intention to interfere with the decision in the Hamilton College case. In the present case it was shown that individual trustees were active in procuring subscriptions. But as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were all co-laborers in promoting a common object." Followed in *Twenty-third Street Church v. Cornell*, 117 N. Y. 601.

The purpose need not be charitable nor strictly public. Re-building a woollen mill is a good object.<sup>1</sup> Where one gave his note, not negotiable, conditioned to liquidate an indebtedness of a university, it was held that the setting a part of the note and other like notes, as a fund for the indicated purpose, did not render the act obligatory.<sup>2</sup> The court said: "But grant that by acceptance of the note, the university impliedly agreed to comply with the direction, that is, to apply the proceeds to the payment of its indebtedness. Is that a promise to do an act of advantage to Johnson, or of detriment to the institution, in the sense requisite to constitute it a legal consideration? We think it is not. \* \* \* In the absence of special circumstances we fail to see how a duty to apply the fund to a particular corporate purpose can better serve as a consideration than a duty to apply it to corporate purposes not specified. The duty in either case is implied."

*Mutual promises*: Some courts hold that the mutual promises constitute a sufficient consideration, but they are in the great minority.<sup>3</sup>

*Effect of seal*: If the subscription is sealed, "it would seem, on general principles, that the objection of want of consideration

<sup>1</sup> *Pitt v. Gentle*, 49 Mo. 74.

<sup>2</sup> *Johnson v. Otterbein University*, 41 Ohio St. 527.

<sup>3</sup> *Trustees v. Haskell*, 73 Me. 140.  
*State Treasurer v. Cross*, 9 Vt. 289.  
*Amherst Acad. v. Cowls*, 6 Pick. 427  
 (overruled in *Church v. Kendall*, 121 Mass. 528; S. C. 23 Am. Rep. 286.)  
*Lathrop v. Knapp*, 27 Wis. 214 (disapproved).

*Lafayette Co. M. Corp. v. Ryland*, 80 Wis. 29.

*George v. Harris*, 4 N. H. 533.

*Johnston v. Wabash College*, 2 Cart. (Ind.) 555.

*Edinboro' Academy v. Robinson*, 37 Pa. St. 210.

*Comstock v. Howd*, 15 Mich. 237.

*Petty v. Christ Church*, 95 Ind. 278.

could not be brought against an action on the subscription."<sup>1</sup> The rule however would certainly be different in equity.<sup>2</sup>

*Revocation* : A charitable subscription is revoked by the death or insanity of the subscriber before any expense has been made or incurred upon the faith of it.<sup>3</sup>

## Sec. 112. Conditional subscription.

If however the promise is to pay upon a specified condition, it is enforceable upon proof of the fulfillment of that condition.

As when one subscribes toward establishing a school to be located in such county as should contribute a specified sum, the subscriber is bound on proof of such contribution.<sup>4</sup> So where one subscribed on condition that the county supervisors should raise a specified sum by taxation for the erection of a soldiers' monument.<sup>5</sup> Here it is said: "I concede that the doctrine is well established that where such advances have been made or expenses or liabilities incurred by others upon the credit of such a subscription, then it becomes obligatory." So a note made in pursuance of a subscription to help pay a church debt, on condition that the church should raise the balance, is binding on proof that the balance was raised.<sup>6</sup>

The condition however must be contained in the subscription paper, and that may not be modified by a letter.<sup>7</sup> But it may be waived.<sup>8</sup>

The rule is the same whether the subscription is for charity or for value. Thus it is said in *Livesey v. Hotel Co.* 5 Neb. 66, 67, "The rule seems to be well established that when the charter or subscription contract specifically fixes the capital stock at a

<sup>1</sup> 1 Pars. Cont. \* 454.

<sup>2</sup> 1 Pom. Eq. Jur. § 383.

<sup>3</sup> *Beach v. First M. E. Church*, 96 Ill. 177.

*Pratt v. Elgin Bap. Soc.* 93 Ill. 475; S. C. 34 Am. Rep. 187.

*Twenty-third St. Bap. Church v. Cornell*, 117 N. Y. 601.

*Grand Lodge v. Farnham*, 70 Cal. 158.

<sup>4</sup> *Hopkins v. Upshur*, 20 Tex. 89.

*Comstock v. Howd*, 15 Mich. 242.

*Watkins v. Eames*, 9 Cush. 530.

*Williams College v. Danforth*, 12 Pick.

541.

*Trustees v. Stewart*, 1 N. Y. 581.

<sup>5</sup> *LaFayette Co. M. Corp. v. Ryland*, 80 Wis. 29.

<sup>6</sup> *Roberts v. Cobb*, 106 N. Y. 600.

*Presb. Church v. Cooper*, 45 Hun, 453.

See also *Comr's v. Perry*, 5 Ohio, 56.

*Caul v. Gibson*, 3 Pa. St. 416.

*McDonald v. Gray*, 11 Ia. 508.

*McClure v. Wilson*, 43 Ill. 356.

*Norton v. Janvier*, 5 Harring. 346.

<sup>7</sup> *Smith v. Burton*, 59 Vt. 408.

<sup>8</sup> *Hards v. Platte Valley Impr. Co.* — Neb. — ; 58 N. W. Rep. 73.

certain amount, divided into shares of a certain amount each, the whole amount of capital so fixed and required for the accomplishment of the main design of the company must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of subscribers to stock to recover an assessment levied on the shares of stock, unless there is some clear provision in the contract to proceed in the execution of the main design with a less subscription than the whole amount of capital specified. This rule seems to be founded on the principle that by the terms of the grant to the corporation, it is essential to the power of assessment for the general objects and purposes of the institution that the whole capital stock required by the condition precedent must be represented and acted upon by the assessment. This doctrine has underwent an exhaustive discussion in many cases, and it is not deemed necessary to bring into view the arguments in support of it. *Mill-Dam Corp. v. Ropes*, 6 Pick. 23, 9 Pick. 195; *Chabot & West Springfield Bridge v. Chapin*, 6 Cush. 53; *Shurtz v. Railroad Co.* 9 Mich. 269; *Topeka Bridge Co. v. Cummings*, 3 Kan. 76; *Railroad Co. v. Clarke*, 61 Me. 384; *Railroad v. Johnson*, 30 N. H. 404; *Railroad v. Preston*, 35 Iowa, 118. And the rule is the same in England. *Fox v. Clifton*, 6 Bing. 776; *Pitchford v. Davis*, 5 Mees. & W. 2; *Proprietors v. Theobald, Moody & M.* 151."

### Sec. 113. Conditional subscriptions—character, etc.

If a subscription to stock is conditioned not to be binding unless a specified aggregate sum is subscribed, parol evidence is competent to show the character of other subscriptions—whether made in good faith or not.<sup>1</sup>

Proof is admissible that subscriptions are made simply to induce others, and with the understanding that they are not to be paid, and such proof will avoid the later subscriptions.<sup>2</sup> But it seems that this doctrine would not apply where land was deeded absolutely and unconditionally in the place of or to effectuate a subscription.<sup>3</sup> An unexpressed condition may not be added by parol.

<sup>1</sup> *New York Ex. Co. v. DeWolf*, 31 N. Y. 273.

<sup>2</sup> *N. Y. Ex. Co. v. DeWolf*, 31 N. Y. 273.

Same principle in *Berry v. Yates*, 24 Barb. 200, the case of a subscription to capital stock.

<sup>3</sup> *Blewett v. Cable Ry. Co.*, 51 Fed. Rep. 625.

*Illustrations:* 1. Thus, in *Sourse v. Marshall*, 23 Ind. 194, where the defendant subscribed ten dollars to aid in erecting a church, it was held error to permit him to testify that he understood it was to be a free church. In *Crane v. Elizabeth Library Association*, 29 N. J. L. 302, where subscribers agreed to contribute for the erection of a public library, with reading and lecture rooms, and to take the number of "shares" set opposite their names, it was held that parol evidence was inadmissible to show that the agreement was intended by the subscribers as one for corporate stock. The court said: "Where the parties have by a written paper, purporting to be complete on its face, that is to be a full agreement, undertaking to define the whole nature and extent of their agreement, parol evidence ought not to be admitted to add a single stipulation or vary the legal effect of those contained in it, although by mistake the parties have omitted to insert some term which may be necessary to its completeness, and thus left it inoperative for ambiguity or uncertainty. The whole question seems one of intention. If the intention of the parties was that the paper should be the repository of their contracts in all its parts, parol evidence was inadmissible to add to it a missing stipulation or to show a contract inconsistent with the writing." "The writing was intended to be complete and to embody the whole agreement. It was not a part of an entire parol agreement which preceded it, and which the parties did not intend to supplant by the writing." "The effect of the paper was to subject him to the consequences of a donation to the purposes indicated in the paper, in company with those who might subscribe with him, as persons who associate together for such a purpose without an incorporation. The effect of the evidence was to convert such an engagement into a subscription to the stock of an existing corporation, and to subject his investment to the control of a board of directors, to be disposed of without his consent." In *Bull v. Talcot*, 2 Root 119, parol evidence was held inadmissible to show that a subscription for erecting a court-house was on the oral condition that it should not be larger than would answer for a convenient dwelling-house. In *First Free-Will Baptist Parish of Farmington v. Perham*, Supreme Court of Maine, 1892, 24 Atl. Rep. 958, an action to recover the defendant's subscription for building a meeting-house, he offered to prove that when he signed the paper it was the understanding on his part that another person should subscribe an equal amount, and that he should not be



required in any event to pay any more than such other person. The court excluded the offered evidence, and also other offers of oral proof or what was said or understood at the time of signing the paper. *Held* correct.

2. So in an action on a subscription for a county map in advance of publication, it was held incompetent to prove an oral representation that the map was to contain certain engravings which were not supplied.<sup>1</sup> But in the same case it was held that the subscriber was not bound if the map contained nicknames of some of the land-owners and ridiculous epithets concerning them. This was put on the ground that it was a libel. "No one contracting to take a map as the defendant did, would ever think of inserting an express provision to guard against these things, for the very reason that any such contract would be interpreted to exclude them by implication." So parol evidence was admitted to show that a subscription for the erection of a Roman Catholic chapel was upon the oral condition, agreed upon by the subscribers, that they should have the choice of ownership of the pews in the order of the amount of their respective subscriptions.<sup>2</sup> The court said this did not "tend to establish a purpose or arrangement which was inconsistent or at variance with the written agreement." So a subscription payable in cash may not be shown by parol to be payable in labor.<sup>3</sup> In an action against a subscriber to a paper stipulating that the subscribers would pay the sum annexed to their names to any person who should thereafter build a free bridge at a specified place, the same to be paid upon the completion of the bridge, it was *held*, (1) that the instrument was a valid contract between the subscribers thereto and any one who should afterward build the bridge according to its terms; and that as relates to the payee, it was like a note payable to the bearer; (2) that parol evidence was inadmissible to show the work was to be let to the lowest bidder, there being no such provision in the paper.<sup>4</sup>

#### Sec. 114. Subscription to stock.

A subscription to stock is not variable by parol except in case of fraud or mistake.<sup>5</sup>

<sup>1</sup> *Burhans v. Johnson*, 15 Wis. 287.

<sup>2</sup> *O'Hear v. DeGoesbriand*, 33 Vt. 593.

<sup>3</sup> *Stewards v. Town*, 49 Vt. 29.

<sup>4</sup> *Cooper v. McCrimmin*, 33 Tex. 383 ;  
S. C. 7 Am. Rep. 268.

<sup>5</sup> *Turnpike Co. v. Thorp*, 13 Conn. 173.

*Revocation:* But such a subscription is revoked by the death of the subscriber before delivery to and acceptance by the company.<sup>1</sup>

*Gifts:* Gifts are generally made by parol, accompanied by delivery, and these do not come within the scope of this treatise. But when the purpose of a writing is to evidence a gift, and the purpose is unexecuted, parol evidence is competent to show the facts and thus avoid the apparent obligation for lack of consideration.<sup>2</sup>

Johnson v. Pensacola, etc. R. Co. 9 Fla.  
299.

Smith v. Tallahassee, etc. R. Co. 30  
Ala. 650.

Johnson v. Crawfordsville, etc. R. Co.  
11 Ind. 280.

Wight v. Shelby R. Co. 16 B. Monr. 4.

Gilman v. Veazie, 24 Me. 202.

Bell v. Americus, etc. R. Co. 76 Ga.  
754.

Blair v. Buttolph, 72 Iowa, 31.

<sup>1</sup> Wallace v. Townsend, 43 Ohio St. 537;  
S. C. 54 Am. Rep. 829.

<sup>2</sup> Ferry v. Stephens, 66 N. Y. 321.

McKenzie v. Harrison, 120 N. Y. 260.

Carpenter v. Soule, 88 N. Y. 251; S.  
C. 42 Am. Rep. 248.

Matter of Wilbur v. Warren, 104 N. Y.  
192.

## CHAPTER XIX.

## BONDS

- SEC. 115. Character of signing.  
 116. Conditional delivery.  
 117. Mode of payment.  
 118. Municipal bonds—impeachment.  
 119. Municipal bonds—ratification.

**Sec. 115. Character of signing.**

Parol evidence is admissible to show the character in which the obligors signed.

Thus parol evidence is admissible even at law to show that an apparent principal on a bond signed only as surety;<sup>1</sup> or that one who signed as witness was a surety and one who signed as surety was a mere witness.<sup>2</sup> B. was appointed ticket agent of defendant at Memphis, and gave a bond with sureties for faithful performance of his duty. There were two ticket offices, but the bond did not specify to which he was appointed. Subsequently the offices were consolidated and the duties of both were imposed on him, and his salary was increased, without the knowledge of his sureties. *Held*, that parol evidence was admissible to show to which office he was originally appointed.<sup>3</sup>

**Sec. 116. Conditional delivery.**

Where a bond is not executed by all the persons named in it as obligors, parol evidence is admissible to prove that it was delivered to the obligee by some of the persons executing it upon the condition that the others named as obligors should also join in the execution, and the result of such evidence is to render the bond void as to those

<sup>1</sup> *Burke v. Cruger*, 8 Tex. 66; S. C. 58 Am. Dec. 102; citing *Smith v. Tunno*, 1 McCord Ch. 443; S. C. 16 Am. Dec. 617.

<sup>2</sup> *Richardson v. Boynton*, 12 Allen, 138; S. C. 90 Am. Dec. 141.

<sup>3</sup> *Mumford v. Memphis & Charleston R. Co.*, 2 Lea, 393; 31 Am. Rep. 616.

so executing it, and as to all others subsequently executing it, even without condition; but this rule does not apply to a bond perfect upon its face, nor to a bond not executed by all the obligors named therein, but delivered by those executing, not upon such express condition, but upon the mere faith that the others will execute it.

This topic is treated with great learning and research by Chief Justice Corliss, of North Dakota, in 37 Albany Law Journal, 208. He forms the following conclusions:

"1. A surety who signs a bond on condition that the same shall not be delivered unless others execute it, is nevertheless bound, although the bond is delivered by the principal obligor without securing the required signatures, provided the obligee has no notice, actual or constructive, of the condition.

"2. If the obligee has actual notice of the condition, or notice of facts sufficient to put him upon inquiry as to the existence of a condition, the surety is not bound.

"3. The fact that the name of the person appears in the bond who has not signed the bond is sufficient to put the obligee upon inquiry as to the existence of the condition, and the surety is not bound.

"4. If a bond signed by a surety has in the body of it the name of the other surety who has to sign, and the principal obligor before delivery erases the name, the obligee is put upon inquiry; except perhaps in a case where the name is so skillfully erased that the fact cannot be ascertained by a careful examination of the paper. But this should not prejudice the surety. This fourth proposition however cannot be regarded as fully settled by authority, but it is certainly supported by principle.

"5. The fact that the word 'sureties' is in a bond, although only one surety has signed the bond, is not sufficient to put the obligee upon inquiry, when no other name appears in the body of the bond.

"6. The fact that the law requires two or more sureties is sufficient notice to the obligee of the condition that another surety shall sign, where the bond is signed by only one, although no other surety is named in the body of the bond.

"7. A bond cannot be delivered by the surety directly to the obligee upon any condition whatever, for the reason that it cannot be delivered to the obligee in escrow. Therefore delivery by the

surety to the obligee on condition that another surety shall sign, makes the bond binding upon the surety who does sign, although the condition is never fulfilled.

"8. A bond can be delivered to the principal or any other co-obligor in escrow, and therefore a surety can attach a condition to such delivery which will be valid if the obligee has notice of it, actual or constructive.

"9. A mere promise on the part of the principal obligor to procure other signatures is not sufficient to exempt the surety from liability, although the obligee had notice of it, actual or constructive, unless such agreement amounts to a condition that the bond shall not be delivered without such persons signing. However, very slight evidence seems to be sufficient to sustain a finding that there was a condition, and the question is largely a question of fact.

"10. Delivery of bond to third party, to be delivered to the obligee on the performance of the condition, will not protect the surety if the bond is delivered to the obligee by the principal obligor, and the obligee has no notice of the fact of the delivery to the third person, whether knowledge that there had been such delivery to a third party would be sufficient to give the obligee constructive notice of the condition is not settled, but it probably would be sufficient.

"11. Notice, actual or constructive, to the agent of the obligee, whose duty it is to approve the bond, is notice to the obligee. But this was held not to be the rule where the agent was also surety on the bond, and another agent of the obligee, who had no notice, approved the bond. *Stevenson v. Bay City*, 26 Mich. 44.

"12. Notice to the nominal obligor is sufficient to bind all who sue upon the bond, either in the name of such obligee for their own use, or in their own names where the statute authorizes the suit to be so brought.

"13. Notice to any agent of the obligee is not sufficient. He must be charged with some duty with respect to the bond.

"14. Surety who signs a bond with blank spaces in the body is bound, although the principal obligor fills in the blanks in defiance of the conditions on which the surety signed and the surety expressly provided that he should not in that case be bound. Some cases hold that express authority by parol will not render the surety liable, although the blanks are filled in according to such authority and in harmony with the condition.

"15. Knowledge by obligee that surety signed the bond with blanks in it, will not exonerate the surety, though the conditions as to filling in the spaces are not complied with.

"16. Express authority to fill in the blanks is not necessary. It may be implied from the circumstances.

"17. The fact that the name of a surety, as signed, is erased from the bond, is sufficient to put the obligee upon inquiry as to a condition that such surety should sign.

"18. The law will imply a condition that another surety or the principal obligor was to sign, when his name appears in the body of the instrument. This presumption would be rebutted if it appeared that all the parties delivered the bond without disclosing any such condition, but it is doubtful if a delivery by part would be sufficient to rebut such presumption, except as against themselves. As to all who delivered the obligation without stating the condition, the existence of a name in a bond not signed thereto, would not be notice of the condition that such person was to execute the bond.

"19. If the law requires the principal to sign the bond, his failure to do so will discharge the sureties, unless possibly in case they waived his signing it. Some cases hold absolutely that he must sign it.

"20. If the law requires the principal to execute the bond, the obligee takes with notice of the condition, created by the law, that he must sign, and the sureties are not liable in case he does not sign. Of course if the principal is named in the bond, this is notice the same as in the case of a surety.

"21. Whether in case a signature is forged the surety is liable is perhaps not settled. On principle he should be. Some cases hold the contrary.

"22. But it has been held that where sureties sign, assuming that others whose names are signed are bound, and it transpires that for some reason they are not liable, the sureties who subsequently signed on the faith of their liability will not be held. These are cases where the bond has been actually signed by other sureties, but they are not bound because of a subsequent alteration of the instrument, or for some other reason. But where the bond is never in fact signed by the surety by whom it purports to be signed, but his signature has been forged thereto, then the sureties subsequently signing should perhaps be held on the ground that they take the risk of the signature being genuine.

But should they not also take the risk of the surety, whose name is in fact signed, being bound?"

1. There can be no question that if a bond is not executed by all whose names appear on its face as obligors, a delivery to the obligee upon condition that it shall not be effectual unless executed by all is valid. *Pawling v. United States*, 4 Cranch, 219, A. D. 1808; *State Bank v. Evans*, 15 N. J. L. 155, A. D. 1835; *Fletcher v. Austin*, 11 Vt. 447, A. D. 1839. This principle is conceded in all the cases. It was formerly supposed that the same rule prevailed as to bonds as in respect to deeds, and that the obligor could not impose any condition on their delivery when made to the obligee or his agent. This doctrine however was at an early day disavowed in New York. In *Lovett v. Adams*, 3 Wend. 380, Chief Justice Savage says: "If a bond be signed and put into the hands of the obligee, or a third person, on the condition that it shall become obligatory upon the performance of some act by the obligee or any other person, the paper signed does not become the act of the party signing the same until the condition precedent be performed. Until then there is no contract." This was followed in *Bronson v. Noyes*, 7 Wend. 188, which was also a case of delivery to the obligee. These decisions have been recognized and approved in *People v. Bostwick*, 32 N. Y. 445, which was a case of delivery to a co-obligor of a bond perfect on its face. In this case Judge Campbell very clearly shows, although perhaps *obiter*, the distinction between a deed and a bond in respect to conditional delivery. He says: "On the delivery of the deed of the grantor to the grantee, as and for the deed of the former, no matter what the verbal conditions, the title, *eo instanti*, vests in the grantee, and can only be divested by process of law or by the voluntary execution of a deed by the grantee. A deed once delivered and accepted, its re-delivery by the grantee will not re-vest the legal title in the grantor. But a bond carries no title; it gives on its face only a right of action if the condition contained in it is not performed. Its return to the obligor as a matter of course destroys such right of action. While therefore a deed may not be given to a grantee in escrow, with verbal conditions, on the performance of which it is to take effect, a bond may be given with conditions to the obligee, because the obligee takes nothing by his bond but a right of action, which, to render available to him, he must enforce by action, and which may be resisted by the obligor, showing that the condition had

not been performed, and therefore there was no debt—not urging the written contract, but showing that it never had any legal existence, having never in fact been delivered.” Chief Justice Denio, who also wrote an opinion in this case, seems to base his decision more on the principles of agency, holding that “until the deed is delivered to the party in whose favor it is intended to operate, or to some person in his behalf and for his immediate benefit, it is in the power of the parties who are eventually to be bound by it, although they have signed and sealed it, to withhold the delivery altogether, or to create an agency for its custody, and to direct its delivery upon any contingency or condition which they may see fit to prescribe.” The same principle was laid down in *King v. Smith*, 2 Leigh, 157, where A executed and delivered on condition that B should also execute, and B executed and delivered on condition that C should also execute, but C did not execute; it was held that neither A nor B was liable. The same principle was also recognized in *Tindal v. Bright*, Minor (Ala.), 103.

2. *Bibb v. Reid*, 3 Ala. (N. S.) 88, is based to some extent on the Pawling case. The court say: “We are satisfied, that on principle there can be no difference between a conditional delivery to a stranger or to a co-obligor; that in either case the deed”—this was the case of a bond—“cannot be operative until the condition is performed, and such is clearly the weight of authority at the present day.” *Perry v. Patterson*, 5 Humph. 133, A. D. 1844, was the case of a note, delivered to the creditor, upon condition, and was decided harmoniously with the principal case, without much consideration, the court remarking: “The law upon this point is settled beyond controversy, and needs at this day no investigation.” The same may be said of *Sessions v. Jones*, 6 How. (Miss.) 123, A. D. 1842, where a bond was delivered conditionally to the principal obligor, the court merely remarking: “It is shown that the bonds were absolutely void, and that Jones was not to be bound at all unless the bonds were also signed by Stone.” *Clements v. Cassilly*, 4 La. Ann. 380, A. D. 1849, holds that where in a bond on attachment three persons are named as principals and one as surety, and only one principal and the surety sign, the latter will not be bound in the absence of evidence to destroy the presumption that he expected the three persons named as principals to be bound as such, or that he would have any recourse against them, if he paid the amount. To this prin-



ciple the court cite *Wood v. Washburn*, 2 Pick. 24, where the same doctrine was held, without consideration, as to an administrator's bond, not signed by the administrator, the decision being that it was not a probate bond; and *Bean v. Parker*, 17 Mass. 591, which was the case of a bail bond not signed by the party arrested as principal.

3. Some of the cases go even further, and hold that a discharge of one surety, by reason of an unfulfilled condition, operates to discharge others who have subsequently executed the same obligation unconditionally. Thus in *Ward v. Churn*, 18 Gratt. 801, a joint bond, drawn with the names of the principal and four sureties inserted, was executed and delivered by all but the last-named surety, but the delivery by the first two sureties was on the condition that the other two named should execute it; it was held not only that the sureties so conditionally delivering were not bound, but that the surety delivering unconditionally was not bound, the bond being void as to the former was void also as to the latter. In *Seely v. People*, 27 Ill. 173, a joint and several bond was drawn for execution by Heaton, Seely and Morrow; when presented to Seely, Heaton's name was signed to it, and Seely supposed he had executed it, but his signature was forged; *held*, that Seely was not liable. Chief Justice Caton said; "By a fraud practiced upon the defendant by means of the commission of a high crime, he was made to assume a different and a greater liability than he intended or supposed he was assuming, when he executed the bond. It is not like the case where the surety when he signs the bond is assured and made to believe that others will afterward sign it. In that case he acts upon the simple assurance that another will do an act which he knows may be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. But in this case he acted upon an apparent fact," etc. In *Pepper v. State*, 22 Ind. 399, a bond was drawn up with certain names inserted as obligors, and presented by the principal to one of those persons for signature, and he signed and delivered it unconditionally, there being several signatures previously attached; it afterward appeared that one of those previous names was a forgery, and that some of the other previous signers had executed upon conditions which were never fulfilled; it was held that the bond was void as to the surety who executed unconditionally, unless it were shown that he had knowledge of its invalidity as to the others at the time he signed it.

The court observed: "As to those who signed without any false representations, promises or pledges having been made to them, we are clearly of opinion that the bond is of no binding force. Each man had a right to rely upon the fact which appeared before him on the bond, namely, that he was entering into a contract in which certain other men whose names were there signed, were jointly bound with him. When they are discharged it increases his liability, and in fact it is no longer his contract, and the contract which he supposed he was making." In *Chamberlin v. Brewer*, 3 Bush, 561, a plea by the sureties on a joint official bond averred that when they signed it the name of B as surety was on it; that they signed it in the presence of the county court, which, together with the principal, represented that B had signed the bond; whereas he had not signed it, and it was not his act, and he was not bound, and that it is not their act and they are not bound; *held*, that the plea set up a good defense of *non est factum*. In *Hall v. Smith*, 14 Bush, 604, it was held that when several persons are named as sureties in the body of a bond, and some sign and deliver it to the principal upon the condition or agreement that all the parties named therein are to sign it before delivery to the obligee, such of the sureties as so sign the bond are not bound until it is executed by all the parties named therein, unless they waive the right to have it executed by all, or consent to the delivery to the obligee without being so executed; and that when a bond is signed by part of the sureties named therein, and the principal procures the signature of others in place of those named therein who do not sign it, and then delivers it to the obligee, such of the sureties named therein as signed the bond are not bound thereby, unless they consented to the substitution or to the delivery.

4. In *Millett v. Parker*, 2 Metc. (Ky.) 608, A. D. 1859, the delivery was to the principal obligor, and the decision proceeded on the ground that the delivery enabled him to apply the bond as it was applied. Of the case of *Pawling*, it is here remarked: "It does not appear to whom the instrument was delivered, or who had the possession of it at the time of its conditional execution. The position contended for is not therefore sustained by anything that was decided in that case." The court observed: "If however a surety be permitted to sign an instrument, and make a conditional delivery thereof to the principal obligor, with the effect of imparting to the writing the character of an escrow,

the security against imposition, which is furnished by the rule that requires the conditional delivery to be made to a stranger, is completely removed, and there is no security against the perpetration of the most gross frauds. The principal obligor is the person who desires to use the instrument for his own purposes; the surety, by putting his name to the paper, and leaving it in the possession of his principal, enables him to make use of it, and impose on a person who is ignorant of the secret agreement between him and the obligors. In such a case the surety trusts to the promises of his principal; he does not deliver the writing to him as an escrow, but as his obligation, which he is not to use until he procure an additional surety. If however he violates the trust reposed in him, and makes use of the writing, the surety, although his confidence has been abused, is bound by the instrument."

5. The most authoritative decision is *Dair v. United States*, 16 Wall. 1, A. D. 1872. The syllabus is as follows: "A bond, perfect, upon its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it upon a condition that it should not be delivered unless it was executed by other persons who did not execute it, it appearing that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice." This decision is based on the doctrine of estoppel *in pais*. The court concede that "if the name of Joseph Cloud appeared as a co-surety on the face of this bond, the estoppel would not apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the government, who would have been put upon inquiry to ascertain why Cloud did not execute it," etc. The case of *Pawling v. United States*, 4 Cranch, 218, is distinguished by the circumstance that there, the name of the co-surety, who did not sign, appeared on the face of the bond. The same doctrine had been previously held, and upon the same ground, in *State v. Pepper*, 31 Ind. 76, A. D. 1869. Of the *Pawling* case it is here remarked: "When it is considered that this is the original decision upon which all the cases that assume to release the surety from liability, when the name of the co-surety does not appear on the face of the instrument, are based, the entire want of

authority to justify their departure from sound principle can be appreciated." The court also distinguished *Oneale v. Long*, 4 Cranch, 60, and *Harper v. State*, 7 Blackf. 61, on the ground that the question there was simply one of alteration, the principal having inserted the names of other sureties, without the defendant's knowledge or consent. In this decision much weight was attributed to *State v. Peck*, 53 Me. 284, A. D. 1865. This case gives the most learned review of the authorities. One peculiarity of this case must be remarked, that "this conversation of Cummings was with a co-surety and co-defendant, and, so far as appears, never communicated even to Peck, the principal in the bond." The cases cited and commented on here are: *Duncan v. United States*, 7 Peters, 435; *Wells v. Dill*, 1 Martin (N. S.), 592; *Scott v. Whipple*, 5 Me. 336, cases of apparent incomplete execution; *Haskins v. Lombard*, 16 Me. 140, where the bond was so written that it seems to have been contemplated by the parties that it should be signed by several, and so the oral condition was held effectual; *Fertig v. Bucher*, 3 Barr, 308, and *Quarles v. Governor*, 10 Humph. 122, where the agreement was by the agent of the obligee, etc. *People v. Bostwick* was strongly disapproved, and *Millet v. Parker* was approved. In *McCormick v. Bay City*, 23 Mich. 457, A. D. 1871, the court say: "It was in his power to insert the name of the desired sureties and to make the bond joint and not several. He took none of these precautions. On the other hand he put it in the power of the principal debtor to get as many or as few sureties as he chose, and to deliver the bond in a shape and under circumstances raising no suspicion." The case of *People v. Bostwick* must be considered as shaken if not overruled by *Russell v. Freer*, 56 N. Y. 67. Here a bond was prepared, executed by H. and F. and delivered to C., the name of J. appearing as co-obligor, and C. telling them that J. would also sign it, and they signing it with that expectation, but it not appearing that they made his signing a condition of delivery. The name of J. was subsequently stricken out of the bond, without their knowledge or consent, and the bond was thus delivered to the obligee, who had no knowledge or notice of these facts. *Held*, that H. and F. were liable. The court say: "The appellants, by executing the bond, and leaving it with Dolson, the principal, placed it in his power to deliver it as a valid and complete instrument," etc. Of *People v. Bostwick* they say: "The facts do not bring the case within the principle" of that case,

"assuming that this case was well decided, which may well be questioned. But in that case stress was laid and the judgment was based upon the fact that the agent of the principal was directed by the sureties who executed the bond not to deliver it to the auditor unless it should first be executed by Dickerson as co-surety, and that he did deliver it without doing this. No such fact is found in this case." The court in this case cite with approval the cases of *Dair v. United States*, *State v. Peck*, *State v. Pepper*, and *McCormick v. Bay City*.

6. The same doctrine was laid down in *Webb v. Baird*, 27 Ind. 368. The latter case followed the Maine case and the case of *Deardorff v. Foresman*, 24 Ind. 481. This last case however was one of commercial paper, which is manifestly governed by different rules, and was distinguished for that reason by the court in its opinion from the case of *Pepper v. State*, *supra*. See, to the same effect, *State v. Garton*, 32 Ind. 1. In all these cases which are cited above as holding a different doctrine from the principal case, the bonds were executed by all the obligors whose names were recited in the body, and the obligees had no knowledge or notice of the conditional delivery. If these facts, or either of them, had been otherwise, it was conceded that the rule would be the contrary.

7. In *Cutler v. Roberts*, 7 Neb. 4; S. C. 29 Am. Rep. 371, it was held that a bond, perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it upon the condition that it should not be delivered unless it should be signed by other persons, who did not sign the same, if the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution, provided he has upon the faith of such bond been induced to act on his own prejudice. The court here said: "From a careful examination of the authorities, we think the following rules may be deduced: First. That a bond, which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered

unless it should be signed by other persons, who did not sign the same, if it appear that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, provided he has been induced upon the faith of such bond to act to his own prejudice. Second. That where a bond contains in the obligatory part of the names of several persons as sureties, if a part sign the same with an understanding and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part as sureties, it will not be valid as to those that do sign until the condition is complied with. Third. If there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor to be delivered to the obligee only upon certain conditions, which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond. Fourth. That a statutory bond must conform substantially to the requirements of the statute in respect to its penalty, conditions, form, and number of sureties."

8. In *Guild v. Thomas*, 54 Ala. 414; S. C. 25 Am. Rep. 703, where the defendant signed an injunction bond as surety, and delivered it to the principal on the condition that it was not to be delivered to the obligee unless certain others also signed it as sureties, and the principal delivered it in violation of that condition, *held* that the defendant was not liable. The court observed: "To the obligee, or grantee, or promisee, there may not be a conditional delivery. Possession of the instrument being transferred to him, by the consent of the obligor, or grantor, or promisor, the effect and validity of the instrument must be determined from its terms. Parol evidence to change its character, or to vary or contradict its words, would infringe the well-settled rule that parol evidence cannot be received to vary, alter, or contradict a written instrument. If conditions, resting in parol, annexed to its delivery, could be shown to render it a conditional instead of an absolute instrument, as its terms imported, it would be subject to the mischief, against which the inhibition of parol evidence, in variation or contradiction of written evidence, was intended to guard. The instrument may however fall to the possession or custody of any other person than the grantee or obligee. A bond for the performance of official duty, as an administrator's or a constable's bond, may be delivered as an escrow to a co-

obligor, or to a stranger. *Bibb v. Reid*, 3 Ala. (N. S.) 88; *Robertson v. Coker*, 11 id. 466; *Firemen's Ins. Co. v. McMillan*, 29 id. 147. The delivery which perfects the instrument, like the signing of it, must be by the party to be bound by it, or by some one having authority to bind him in the premises. When the delivery is by him who held it as an escrow, the extent of his authority is the fact on which the validity, the completeness of the instrument depends. The party who deals with him is aware that he is acting for another on whom a liability is to be imposed, and must ascertain whether he has the authority he is exercising. All who deal with an agent, or with one representing another, must at their peril ascertain the extent of his authority. This general principle is not denied by the appellant, but he insists that the appellee, by intrusting the principal with the custody of the bond, to procure others to sign as sureties, and then to deliver it, clothed him with the character of a general agent, inducing the obligee and others to deal with him, on the supposition that he had the authority to deliver it, the instrument not bearing on its face any evidence of incompleteness. The argument is not without its force, and is recognized by the authorities to which we have been referred. \* \* \* It can hardly be affirmed that it is a legal presumption that an obligor having custody of the instrument, has authority to deliver it, when the same presumption would not be drawn from its custody by a stranger. Why it should be drawn in the one case and not in the other, it seems to us difficult to assert on any sound reasoning. It may be that the obligee or others would be less reluctant to receive it without inquiry from a co-obligor, than from a stranger; yet each must have the same authority, if the instrument becomes valid with the consent of all who are to be bound. If it is said the co-obligor has, by the condition of the delivery, the opportunity of using the instrument for the purpose for which it is intended, the answer is, he can use it only by the acceptance of the obligee. The obligee trusts therefore to his representations, either in word or act, as to the extent of his authority, and is in the same condition of all who deal with an agent exceeding his powers."

9. That the case of *People v. Bostwick* is not now regarded as of much authority in New York is also evident from the following from *Bangs v. Bangs*, 41 Hun, 41: "We think the defense cannot be maintained. The defendants' counsel relies mainly upon the case of *People v. Bostwick*, 43 Barb. 9; S. C. affirmed, 32 N. Y.

445. It has been said in the Court of Appeals that the decision in that case may well be questioned. *Russell v. Freer*, 56 N. Y. 67, per Grover, J., p. 71. The case has been severely criticised in other States. *Deardorff v. Foresman, Ind.*, 5 Am. L. Reg. (N. S.) 539; *State v. Potter*, 63 Mo. 212; S. C. 21 Am. Rep. 440; 16 Am. L. Reg. (N. S.) 179. Decisions averse to it have been made by the Supreme Court of Maine. *New York County M. F. Ins. Co. v. Brooks*, 3 Am. L. Reg. (N. S.) 399. *State v. Peck*, 53 Me. 284; in Indiana, *State v. Pepper*, 31 Ind. 76; S. C. 12 Am. Rep. 637; in Kentucky, *Millett v. Parker*, 2 Metc. 608; and by the Supreme Court of the United States. *Dair v. United S. States*, 16 Wall, 1. We are not aware that the case has been cited approvingly by our Court of Appeals, except in the recent case of *Whitford v. Laidler*, 94 N. Y. 145; S. C. 46 Am. Rep. 131, where it was referred to in support of a rule very different from that on which the defense rests in the case before us.”<sup>1</sup>

### Sec. 117. Mode of payment.

Parol evidence is admissible to show an agreed mode of payment and discharge other than that specified in the bond.

As in *Walters v. Walters*, 12 Ired. L. 28; S. C. 55 Am. Dec. 401, where at the time of executing the bond it was orally agreed that if the obligor paid certain costs the bond should be surrendered; and in *Chester v. Bank of Kingston*, 16 N. Y. 336, where it was agreed to be held as collateral to the debt of third parties, and to be cancelled on the payment thereof. In *Worrell v. Forsyth*, — Ill. —, 30 N. E. Rep. 673, by an ante-nuptial agreement under seal, a wife agreed to take 80 acres of land after her husband's death in lieu of dower. Afterwards the husband conveyed said land by deed in which his wife joined, and on the same day he conveyed another 80-acre tract to

<sup>1</sup> The rule is also sustained by *Police Jury v. Haw*, 2 La. 41; S. C. 20 Am. Dec. 294.

*Miller v. Fletcher*, 27 Gratt. 403; S. C. 21 Am. Rep. 356.

*Carroll County v. Ruggles*, 69 Iowa, 269; S. C. 58 Am. Rep. 223.

*Mathis v. Morgan*, 72 Ga. 517; S. C. 53 Am. Rep. 847.

*Hall v. Parker*, 37 Mich. 590; S. C. 26 Am. Rep. 540.

*Trustees of Schools v. Sheik* 119 Ill. 579; S. C. 59 Am. Rep. 830.

*Taylor Co. v. King*, 73 Iowa, 153; S. C. 5 Am. St. Rep. 667.

*Whitaker v. Richards*, 134 Pa. St. 191; S. C. 19 Am. St. Rep. 684.



a trustee in trust to convey same to his wife if she survived him. *Held*, that parol evidence was admissible to show that this conveyance in trust was made as a substitution for the ante-nuptial agreement, the wife having accepted the land after the husband's death. The court said: "It is however claimed by the appellee that all the testimony going to show a verbal agreement for the substitution of the one tract of land for the other was incompetent, and should not have been admitted, on the alleged ground that the ante-nuptial contract was an executory agreement under seal, and that the terms of such an agreement cannot be altered, changed, or varied by parol testimony. \* \* \* If the change made by the substitution of the one tract for the other, which was consummated by the execution at the same time of two instruments under seal, to wit, the deed to McGill and the deed to Adams as trustee, should be regarded as a parol agreement entered into for the purpose of modifying an executory contract under seal, it is nevertheless true that such parol agreement has been executed in full. An executed parol agreement may be shown to defeat a recovery upon an instrument under seal. If the new parol agreement, even though it be without consideration has been executed, and by means thereof one of the parties thereto has been led into a line of conduct which must be prejudicial to his interests, an equitable estoppel arises in his favor."

But parol evidence is inadmissible to show that payments of interest provided for by a bond were not to be made in case of the death of the obligee, in the absence of any allegation of fraud or mutual mistake, or demand for a reformation.<sup>1</sup>

### **Sec. 118. Municipal bonds—impeachment.**

Parol evidence of failure to comply with statutory requirements is admissible to impeach municipal bonds, (1) in the hands of the original obligees; (2) in the hands of any subsequent holder taking them with knowledge or notice of such infirmity; (3) in the hands of innocent transferees for value and in good faith, unless the bonds contain recitals going to show that they were regularly issued.

<sup>1</sup> *Richards v. Day* (N. Y. Sup. Ct. Gen. Term), 45 N. Y. St. R. 722, 18 N. Y. Supp. 733.

There is no conflict of authority as to the first two divisions of the rule, even though the bonds contain recitals tending to show compliance with the statute. In respect to the third division there is a conflict between the holdings of the Federal Supreme Court and some States following their lead, and those of the New York courts; the former holding such recitals *conclusive* in favor of *bona fide* holders as to all such paper except that which is issued without color of *power*, and the latter holding such recitals only *prima facie* evidence of authority, and subject to contradiction.

*The Federal doctrine:* Nowhere have the decisions of the Federal Supreme Court on this matter been so concisely and admirably summed up as in Mr. Daniel's Treatise on Negotiable Instruments. He says:

"Sec. 1537. The Supreme Court of the United States has enunciated the following doctrines on this subject as applicable to corporations, private and public, which we shall divide into two series. The *first* series are as follows:

"*First.* Where a party deals with a corporation in good faith, and the transaction is not *ultra vires*, and he is unaware of any defect of authority, or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.<sup>1</sup>

"*Second.* When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.

"*Third.* That where negotiable bonds or securities on their face import by recitals a compliance with the law under which they were issued, the purchaser is not bound to look further for evidence of compliance with the conditions annexed to the grant of power to issue them.

"*Fourth.* That if it appears to have been the sole province of the officers who execute and issue the bonds or securities to decide whether or not there has been antecedent compliance with the regulation, condition, or qualification prescribed to their

<sup>1</sup> Commissioners v. Aspinwall, 21 How. 539.

authority, their determination that there has been such compliance and declaration to that effect is sufficient, and cannot be impugned as against a *bona fide* holder.

"*Fifth.* That from the mere fact that the bonds or securities are issued and subscribed to the object of their issue, the purchaser has a right to assume that the conditions precedent to the right to issue have been fulfilled, and in an action on the bonds or coupons the plaintiff need not aver the performance of such conditions.

"*Sixth.* That if the legal authority be sufficiently comprehensive, a *bona fide* holder for value has a right to presume that all precedent requirements have been complied with.

"*Seventh.* That if there be lawful authority for the corporation to issue the bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the corporation issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them."

"Sec. 1538. *Qualifications of doctrines stated.* But the effect of its decisions is to qualify these doctrines by a second series of propositions, as follows:

"*First.* That where the power on the part of the corporation officers to make the contract for the corporation never existed, negotiable securities issued by them are invalid in the hands of all persons, even innocent purchasers. And such power must appear to exist in express terms, or by necessary implication.<sup>1</sup>

"*Second.* That there can be no ratification save by those who are capable to contract, nor of contracts save of those which it is competent for them to perform."

In *Town of Coloma v. Eaves*, 92 U. S. 491, Strong, J., observes: "When legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds

<sup>1</sup> *Marsh v. Fulton County*, 10 Wall. 683.  
*Bissell v. City of Kankakee*, 64 Ill. 249;  
S. C. 16 Am. Rep. 554.

*Anthony v. County of Jasper*, 101 U. S.  
693.

issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, for the recital itself is a decision of the fact by the appropriate tribunal."<sup>1</sup>

*The New York doctrine*: In the leading case in New York,<sup>2</sup> the bonds were negotiable in form, and were used under a statute authorizing their issue upon the written assent of two-thirds of the resident tax-payers of the town, and attached to each bond was a certificate of the town clerk that such assent had been filed in his office. It was held that this certificate might be contradicted by parol even in the case of subsequent transferees of the bonds in good faith. This was put on the ground of agency. Selden, J., said: "The negotiability of the bonds in no manner aids the plaintiff. It is true they are negotiable, and have in this respect most, if not all, the attributes of commercial paper. But one who takes a negotiable promissory note or bill of exchange purporting to be made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts, of which the agent may naturally be supposed to be in an especial manner cognizant, the *bona fide* holder is protected, because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere act of executing the note or bill amounts, of itself, in such a case, to a representation by the agent to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence of the power itself. In that respect the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognizance of facts which the other cannot be presumed to have known."

<sup>1</sup> See also *Town of Middleport v. Ætna L. Ins. Co.*, 82 Ill. 562.

*Williamson v. City of Keokuk*, 44 Iowa, 88.

*De Voss v. City of Richmond*, 18 Gratt. 356.

*Steines v. Franklin Co.*, 48 Mo. 167; S. C. 8 Am. Rep. 87.

*San Antonio v. Lane*, 32 Tex. 414.

*Auerbach v. LeSueur Mill Co.*, 28 Minn. 291.

*Woods v. Lawrence Co.*, 1 Black, 386.

*Com'rs v. Nichols*, 14 Ohio St. 260.

*Deming v. Houlton*, 64 Me. 254; S. C. 18 Am. Rep. 253.

*State v. Saline Co. Court*, 48 Mo. 390; S. C. 8 Am. Rep. 108.

<sup>2</sup> *Starin v. Town of Genoa*, 23 N. Y. 439. See also *Alvord v. Syracuse Savings Bank*, 98 N. Y. 609.

*Cagwin v. Town of Hancock*, 84 N. Y. 532.

*Craig v. Town of Andes*, 93 N. Y. 405.

Although the Federal Supreme Court dissents from the New York doctrine,<sup>1</sup> yet it recognizes it as controlling in that State.<sup>2</sup> The distinction between the Federal and the New York doctrine is clearly and accurately stated in the argument of the respondent's counsel, in *Town of Cherry Creek v. Becker*, 123 N. Y. 161, as follows: "In fact the only difference between the rulings of the courts of this State and the rulings of the United States courts upon this subject is this, *i. e.*, that if a bondholder brings an action in our State courts the recitals in his bonds do not prove his case, but he is compelled to prove from the records that the bonds are *prima facie* authorized, and the defendant is permitted to show *aliunde* the records that a sufficient number of tax-payers did not take part in the proceedings to give the proceedings any validity whatever; in short, United States courts hold that recitals in the bonds going to show that their issuance was authorized by the town, if these recitals are made by the duly authorized agents of the town, apparently estop the town from showing the contrary, while our courts hold that the question is one of power and the town is not estopped by its recitals in the bonds from showing lack of power, any more than an infant would be estopped from showing he was an infant as a defense to his promissory note, even if the note had come into the hands of a *bona fide* holder, and contained the recital that he was an *adult*. Speaking of *Cagwin v. Town of Hancock*, 84 N. Y. 540, counsel says this case "holds the broad doctrine that where bondholders sue upon their bonds in courts in this State, it is a defense that the bonds were issued absolutely without authority, even *as against bona fide* holders. The Supreme Court of the United States holds the same doctrine in all cases except where recitals upon the bonds show that there was authority to issue them; *Alvord vs. Syracuse Savings Bank*, 98 N. Y. 609, and cases quoted in the opinion upon that page. It will thus be seen that the precise difference between the decisions of this State and the decisions of the United States Supreme Court is, as to the validity of town bonds, where the bonds themselves contain recitals that show that they were issued with authority, which recitals are false; the decisions of this State holding that such recitals do not estop the town

<sup>1</sup> *Town of Venice v. Murdock*, 92 U. S. 496.

*Town of Genoa v. Woodruff*, 92 U. S. 502.

<sup>2</sup> *Scipio v. Wright*, 101 U. S. 665.

*Thompson v. Perrine*, 103 U. S. 806.

from showing want of authority, while the United States decisions hold that the town is estopped from showing want of authority as against *bona fide* holders." The New York doctrine meets the approval of Mr. Daniel (2 Neg. Inst. § 1552), and has been followed in *Veeder v. Lima*, 19 Wis. 280, and *Lewis v. Com'rs.* — Kans., Cent. L. J., Jan. 8, 1874.

### Sec. 119. Ratification

Parol evidence is admissible to show ratification by the municipality of bonds irregularly issued but not *ultra vires*.

Mr. Daniel says (2 Neg. Inst.): "§ 1545. There are four ways, according to the decisions of the United States Supreme Court and of some of the State courts, in which a municipal corporation may estop itself from objecting to the validity of corporate securities:

"(1.) By its members failing to interfere and enjoin their issue when they are about to be executed, and thereby acquiescing.<sup>1</sup>

"(2.) By their submitting to taxation to pay them.<sup>2</sup>

"(3.) By their voting for or submitting to the payment of principal or interest by the corporate officers.<sup>3</sup>

"(4.) By receiving and keeping the proceeds, or benefits of them."<sup>4</sup>

<sup>1</sup> *Supervisors v. Schenck*, 5 Wall. 772.

<sup>2</sup> *State v. Van Horne*, 7 Ohio St. 327.

<sup>3</sup> *Supervisors v. Schenck*, 5 Wall. 772.

*Alvord v. Syracuse Savings Bank*, 98 N. Y. 603.

*Mercer Co. v. Hubbard*, 45 Ill. 142.

*Shoemaker v. Goshen*, 14 Ohio St. 587.

*Railroad Co. v. Marion Co.*, 36 Mo. 295.

<sup>4</sup> *Supervisors v. Schenck*, 5 Wall. 772.

*State v. Van Horne*, 7 Ohio St. 327.

*Barrett v. County Court*, 44 Mo. 199.

## CHAPTER XX.

## JUDGMENTS.

- SEC. 120. *Res adjudicata*—grounds of decision.  
 121. Judgment of another State—impeachment.  
 122. Domestic judgment—impeachment.  
 123. Identification of parties.  
 124. Lost judgment.  
 125. Cause of action.

**Sec. 120. *Res adjudicata*—grounds of decision.**

On a plea of *res adjudicata*, evidence is admissible to show that a particular matter came in question and was under consideration,<sup>1</sup> or the contrary,<sup>2</sup> and to show the grounds of decision.

Freeman says (Judg. § 273): "It is now generally, and perhaps universally conceded, that parol evidence may be received for the purpose of showing whether a question was determined in a former suit."

This point is intelligently treated in *Lillis v. Emigrant Ditch Co.*, — Cal. —; 30 Pac. Rep. 1108, where it is said: "A judgment rendered in any action upon the merits is a conclusive determination respecting the plaintiff's right of action upon the demand sued on, and operates as an estoppel in any subsequent action upon the same demand between the same parties. If the judgment be in favor of the plaintiff, it estops the defendant from afterwards setting up any other defense to the claim than was presented in that action, and if it be in favor of the defendant, it

<sup>1</sup> Doty v. Brown, 4 N. Y. 71.  
 Duncel v. Wiles, 11 N. Y. 420.  
 Kerr v. Hays, 35 N. Y. 331.  
 Bowe v. Wilkins, 105 N. Y. 322.  
 Taylor v. Dustin, 43 N. H. 493.  
 Foster v. Wells, 4 Tex. 101.  
 Walker v. Chase, 53 Me. 258.  
 Young v. Black, 7 Cr. 565.  
 Driscoll v. Damp, 16 Wis. 106.  
 Vanlandingham v. Ryan, 17 Ill. 25.  
 Hill v. Freeman, 7 Ga. 212.

State v. Morton, 18 Mo. 53.  
 Amsden v. Dubuque, etc., R. Co., 32 Iowa, 288.

<sup>2</sup> Smith v. Johnson, 15 East, 213.  
 Whittemore v. Whittemore, 2 N. H. 26.  
 Parker v. Thompson, 3 Pick. 429.  
 Phillips v. Berick, 16 Johns. 136.  
 Coleman's Appeal, 62 Pa. St. 252.  
 Southside R. Co. v. Daniel, 20 Gratt. 363.  
 Spradling v. Conway, 51 Mo. 51.

estops the plaintiff from afterwards presenting any other argument of evidence in support of that claim. It is for such a judgment that it is frequently said that it is conclusive, not only as to the matters which were therein litigated, but as to any other matter which might have been litigated therein. It has become a final determination of the rights of the parties in reference to the demand upon which it was rendered. If however the defendant in such action sets up a defense which is sufficient to defeat the plaintiff's demand, although the judgment is conclusive against the plaintiff as to any ground or matter which he might have presented in support of such demand, yet in an action by him against the defendant upon another demand it is not conclusive upon the defendant, either as to the defense which was pleaded therein, or as to any other defense which he might have interposed to the action. A judgment in favor of a defendant, upon an affirmative defense to the plaintiff's demand conclusively establishes the existence of the fact which constitutes that defense, and estops the plaintiff from questioning its sufficiency to defeat his cause of action, or from maintaining another action upon the same demand. It does not however estop the defendant in an action upon another demand from showing that the evidence by which that fact was established is sufficient to establish a different fact, nor does it limit such evidence to the determination of the defense which was then before the court. The issue then tried by the court was the right of the plaintiff to maintain his action, and the judgment as an estoppel is limited in its operation to that issue; but the fact by which the defendant defeated the plaintiff's right of recovery is not so limited, and may be invoked by him in support of a defense to any other demand by the same plaintiff. As to the successful party, the judgment is conclusive in favor of his right, but not as to all the means which he might have presented for the purpose of establishing that right. In other words, it is conclusive upon the issues, but not upon the facts necessary to establish those issues. In any other action between the same parties upon a different demand, though involving facts which were litigated in the former action, such judgment is conclusive only as to the same matters in issue which were determined in the former action, and which were also essential to the rendition of the judgment. In *Caperton v. Schmidt*, 26 Cal. 494, it is said: 'Neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which only comes collaterally in question,



though within the jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment. The matter, to become as a plea, a bar, or as evidence conclusive, must have been directly in issue. 1 Greenl. Ev. § 528; *Fulton v. Hanlow*, 20 Cal. 451, 486; *McDonald v. Mining Co.* 15 Cal. 145; *Hopkins v. Lee*, 6 Wheat. 109. It will be seen from the rule as here stated that the matter adjudicated, to become as a plea, a bar, or as evidence conclusive, must have been directly in issue, and not merely collaterally litigated. It must be a fact 'immediately found according to the pleadings, not that on which the verdict was merely based—a fact in issue, as distinct from a fact in controversy.' *Potter v. Baker*, 19 N. H. 166; *McDonald v. Mining Co.*, *supra*. 'A fact or matter in issue is that upon which the plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish matters or facts in issue; and notwithstanding they may be controverted at the trial, they do not come within the rule.' *Garwood v. Garwood*, 29 Cal. 521.

"In *Cromwell v. Sac Co.*, 94 U. S. 351, the plaintiff had brought an action against the defendant upon certain coupons in which judgment was rendered in favor of the county upon the ground of fraud and illegality in the original issuance of the bonds. Subsequently the plaintiff in this action, who was the real party in interest in the former action, brought another suit upon other coupons on the same bonds, and, although it was contended that the former judgment was an estoppel against the recovery, yet it was held otherwise, and that the plaintiff was not estopped from proving that he had paid value, and was a *bona fide* purchaser, since the former judgment was not a conclusive determination that the bonds were invalid, but was conclusive only upon the fact that they were invalid in the hands of one who had not paid value for them. In *Campbell v. Consalus*, 25 N. Y. 613, an action had been brought to declare a mortgage satisfied on the ground that it had been paid, and an accounting between the parties was had therein, from which it was ascertained that there were \$2,788 unpaid thereon, and thereupon judgment was rendered dismissing the action. Afterwards an action was brought to foreclose the mortgage, and it was contended that the former judgment was conclusive as to the amount unpaid thereon, but it was held otherwise upon the ground that the amount due on the mortgage was not put in issue in the former action, but only the fact whether

the mortgage had been fully paid, and that the amount that was unpaid was only incidental and collateral to this main issue. See also *Lewis and Nelson's Appeal*, 67 Pa. St. 153; *King v. Chase*, 15 N. H. 9; *Moulton v. Libbey*, id. 480; *Stannard v. Hubbell*, 123 N. Y. 520. In *Sweet v. Tuttle*, 14 N. Y. 465, it was held that where the defendant, together with five others as plaintiffs, had brought an action in which a judgment was rendered against them, he was not estopped in a subsequent action against him by the defendant in the former action, arising out of the same transaction, from showing that seven others were jointly liable with him, and ought to have been joined as defendants in said action.

"When therefore in the second action the former judgment is offered in evidence, it is necessary to ascertain in the first instance whether the cause of action upon which it was rendered is the same as that under prosecution, and if so, it becomes, as a matter of law, conclusive upon the rights of the parties in the second action. If however the cause of action or demand upon which the former judgment was rendered is different from the one prosecuted in the second action, it is then necessary to ascertain as a question of fact what issues or matters were determined in the former action, and then to determine as a matter of law whether those issues and their determination were essential to the former judgment; for it is only issues upon which that judgment depends that the parties are estopped from litigating in any other action. Matters which were merely collateral or incidental to the former determination do not constitute an estoppel, even though they were litigated and decided therein; and the evidence which was introduced in support of such issues may always be introduced in support of a defense in any other action. The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense. For example, if in a suit in ejectment, the defendant alleges and proves a right to the possession of the land by virtue of having acquired an estate therein for years, he will not be precluded, in a subsequent action against him by the same plaintiff to quiet title to the same land, from showing that he was, at the time of the former judgment, the owner in fee of the land."

Evidence is not admissible to show that a particular matter, not within the issue made by the pleadings, was in question and under consideration on the trial. *Manny v. Harris*, 2 Johns. 24.

### Sec. 121. Judgment of another State—impeachment.

A judgment record of another State may be impeached by parol proof of fraud or want of jurisdiction, but not otherwise.<sup>1</sup>

In *Shelton v. Tiffin*, 6 How. 186, while it was held that although the record recited an appearance by attorney, the party might show that it was unauthorized, *McLean, J.*, said *obiter*: "Had the entry been that L. P. Pary came personally into court and waived process, it could not have been controverted." This was also laid down in *Roberts v. Caldwell*, 5 Dana, 512, without much apparent consideration, and so in *Field v. Gibbs*, 1 Peters C. C. 155, by *Washington, J.*, who said that a record could not be contradicted, and if the defendant has not been served nor appeared, "his remedy is the same, and no other, as would be

<sup>1</sup> *Noyes v. Butler*, 6 Barb. 613.

*Judkins v. Arion Mut. Ins. Co.*, 37 N. H. 470.

*Dunlap v. Cody*, 31 Iowa, 260; S. C. 7 Am. Rep. 129.

*Kerr v. Kerr*, 41 N. Y. 272.

*Hoffman v. Hoffman*, 46 N. Y. 30; S. C. 7 Am. Rep. 299.

*Rathbone v. Terry*, 1 R. I. 73.

*Ewer v. Coffin*, 1 Cush. 23.

*Thurber v. Blackbourne*, 1 N. H. 242.

*Aldrich v. Kinney*, 4 Conn. 380.

*Phelps v. Holker*, 1 Dall. 261.

*Shelton v. Tiffin*, 6 How. 163.

*Maguire v. Maguire*, 7 Dana, 181.

*Sewall v. Sewall*, 122 Mass. 156; S. C. 23 Am. Rep. 299.

*Eager v. Stover*, 59 Mo. 87.

*Bowler v. Huston*, 30 Gratt. 266; S. C. 32 Am. Rep. 673.

*Marx v. Fore*, 51 Mo. 69; S. C. 11 Am. Rep. 432.

*Van Fossen v. State*, 37 Ohio St. 317; S. C. 41 Am. Rep. 507.

*Gregory v. Gregory*, 78 Me. 187; S. C. 57 Am. Rep. 792.

*Mitchell v. Ferris*, 5 Houst. 34.

*Chaney v. Bryan*, 15 Lea, 589.

*Reed v. Reed*, 52 Mich. 117; S. C. 50 Am. Rep. 247.

*Thompson v. Whitman*, 18 Wall. 457.

*Reed v. Hansom*, 154 Mass. 87; S. C. 26 Am. St. Rep. 210.

*Pennoyer v. Neff*, 95 U. S. 714.

*McEwan v. Zimmer*, 38 Mich. 765; S. C. 31 Am. Rep. 332.

*Gilchrist v. West Va. etc. Co.*, 21 W. Va. 115; S. C. 45 Am. Rep. 555.

*Gilman v. Gilman*, 126 Mass. 26; S. C. 30 Am. Rep. 646.

*Townsend v. Smith*, 47 Wis. 623; S. C. 32 Am. Rep. 793.

*Contra*: *Hull v. Hull*, 2 Strob. Eq. 174.

*Shafer v. Bushnell*, 24 Wis. 372.

*Harding v. Alden*, 9 Greenl. 146.

*Thompson v. State*, 28 Ala. 12.

*McDonald v. Drew*, 64 N. H. 547.

open to him if the suit had been brought in the State where the judgment was rendered."

Bishop says (Marriage, Divorce and Separation, § 184): "If the record falsely asserts jurisdictional facts, where in truth the court was without authority, they are open to contradiction in the other State, whereupon the judgment will become a nullity." "And so the decisions are now upon a question which has sometimes been decided the other way."

Mr. Freeman (Judgm. § 134) argues against allowing collateral attack on the jurisdiction in respect to domestic judgments, on the ground that the party wronged may appeal, or move to set aside, or obtain equitable aid against the enforcement of the judgment. But certainly, in the case of judgments of other States, this would impose an unjust burden. If a plaintiff by perjury or fraud obtains a judgment without service of process, or notice, or appearance, the defendant should not be put to the expense and inconvenience of contesting it in that other State, but should have the right to resist its enforcement in the State of his own residence. "To say that a judgment obtained under such circumstances," says Durfee, C. J., in *Rathbone v. Terry*, 1 R. I. 77, "is evidence of a debt due from, or a promise made by, the defendant, or that execution of it can be enforced by this court against the person of the defendant, would be to decide against the fundamental principles of law, equity and justice." This view is also adopted by Mr. Freeman (Judgm. § 564), "irrespective of the question whether the record is silent or explicit in regard to jurisdiction."

It has been held invariably that a foreign judgment is open to be assailed by evidence showing a want of jurisdiction. *People v. Dawell*, 25 Mich. 256. But the Constitution of the United States provides that "full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State," and it has been mooted whether this does not make a judgment of one State, rendered by a court of general jurisdiction, and apparently having acquired jurisdiction of the parties, is not conclusive in every other State. This however was explained by Ruffin, C. J., in *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, as follows: "It was intended to restrain one State from disregarding the judicial sentences rendered in another, *between parties* or *on things* within it. It was not an enabling provision under which one State might pass laws directly embracing persons or things

throughout the Union." And Cooley, J., takes the same view in *People v. Dawell*, 25 Mich. 247; S. C. 12 Am. Rep. 260, where he says the provision "had for its object to prevent any such weakening of the bonds of the Federal Union as might follow from the States disregarding courtesy and comity when their respective proceedings should come under consideration, and opening anew the controversies and questions which in the jurisdiction having properly and primarily the control of them had once been determined." "The provision in question was not designed to make good a judgment rendered without jurisdiction." "It is well-settled doctrine that if the court which renders a judgment has no jurisdiction over the parties or the subject matter, it is always open to the defendant to show this fact when he is sued on the judgment in another State."<sup>1</sup> "So that the rule is now settled beyond possibility of change or contradiction, that in an action on a judgment of a court of a sister State, it is open to the defendant to deny the jurisdiction of the court rendering the judgment over his person on the subject matter of the suit."<sup>2</sup>

The majority of cases in which this point is involved are cases of divorce. In one case, in Massachusetts, the doctrine of such cases is carried still further, and it is held that jurisdiction will not be presumed, as "jurisdiction of the subject of divorce is a special authority not recognized by the common law," and must be proved affirmatively.<sup>3</sup>

The limitation of attack to the absence of jurisdiction or the existence of fraud is well illustrated in *Parker v. Albee*, — Iowa —; 52 N. W. Rep. 533, a suit on a judgment procured in Minnesota, where it was held not assailable on the ground that evidence was irregularly or surreptitiously introduced. The court said: "The fact that the will was intercepted and improperly obtained could not so affect the judgment as to subject it to a collateral attack. If it could have any bearing it could only be as to its value as evidence; but that only in the case in which it was evidence. It is said that it was fraudulently and secretly put in evidence by handing it to the trial judge either when the plaintiff was being examined in chief, or at the time the plaintiff was cross-examined, or when the defendant offered evidence in his own behalf. Certainly one of these times was the proper one, and if the manner

<sup>1</sup> Black Judgm. § 887.

<sup>2</sup> Commonwealth v. Blood, 97 Mass. 538.

<sup>3</sup> Black Judgm. § 897.

of presenting it was irregular or improper, the effect of the irregularity or impropriety upon the trial or result was a question for that court or one having authority to review and correct its proceedings. No facts appear to show the judgment void for fraud. As said in *Cottle v. Cole*, 20 Iowa, 481: 'A judgment would conclude nothing, and litigation would never end, if a solemn recovery could be defeated upon the facts pleaded in this case, without more.' So it has been held that a judgment is not collaterally assailable on the ground that it was procured by means of perjury.<sup>1</sup>

A bill in equity constitutes an original and independent proceeding when it calls for the investigation of a new case, arising upon new facts, although it may have relation to the validity of an existing judgment or decree, and of the complainant's rights to claim any benefit by reason thereof, or to be relieved therefrom, as the case may be. In such cases it is now well settled that courts of equity have the unquestionable power to give relief against judgments or decrees which were obtained by fraud, notwithstanding the fact that the suit, as instituted, has relation to frauds alleged to have been committed in a former suit in courts of another jurisdiction, state or national. *Dobson v. Pearce*, 12 N. Y. 156; *Pearce v. Olney*, 20 Conn. 544; *Doughty v. Doughty*, 27 N. J. Eq. 318; *Dringer v. Railway*, 42 N. J. Eq. 573, 8 Atl. Rep. 811; *Yeatman v. Bradford*, 44 Fed. Rep. 537; *Daniels v. Benedict*, 50 Fed. Rep. 353; *Sahlgard v. Kennedy*, 1 McCrary, 293, 2 Fed. Rep. 295; *Gaines v. Fuentes*, 92 U. S. 10; *Barrow v. Hunton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 667; *Arrow-smith v. Gleason*, 129 U. S. 99; *Marshall v. Holmes*, 141 U. S. 597.<sup>2</sup>

## Sec. 122. Domestic judgment—impeachment.

A judgment of a domestic court of general jurisdiction may not be collaterally impeached by parties or privies by parol if it shows jurisdiction upon its face.<sup>3</sup>

<sup>1</sup> Black Judgm. sec. 696.

<sup>2</sup> *Ralston v. Sharon*, 51 Fed. Rep. 707.

<sup>3</sup> *Cook v. Darling*, 18 Pick. 393.

*Sears v. Terry*, 26 Conn. 273.

*St. Albans v. Bush*, 4 Vt. 58.

*Penobscot R. Co. v. Weeks*, 52 Me. 456.

*Crafts v. Dexter*, 8 Ala. (N. S.) 767.

*Wingate v. Haywood*, 40 N. H. 437.

*Cox v. Thomas' Admx.* 9 Gratt. 323.

*Clark v. Bryan*, 16 Md. 171.

*Callen v. Ellison*, 13 Ohio St. 446.

*Horner v. Doe*, 1 Ind. 131.

*Wright v. Marsh*, 2 G. Greene, 94.

*Yaple v. Titus*, 41 Pa. St. 202.

*Hahn v. Kelly*, 34 Cal. 291; S. C. 94 Am. Dec. 742.

In *Edgerton v. Edgerton*, — Mont. — 29 Pac. Rep. 966, it is said: "While there is much conflict relating to certain questions of law concerning judgments, we think it may be safely said to be almost uniformly settled now that domestic judgments of courts of general jurisdiction, valid on their face, cannot be collaterally attacked in courts of the same state, by showing facts *aliunde* the record although such facts might be sufficient to impeach the judgment in question if brought to bear upon it in a proper proceeding. The proposition in this case appears to be to open a way through said decree of divorce for the progress of this action, by going back of that judgment, and raising a question as to the good faith and lawfulness of the plaintiff's conduct in obtaining it. Such a practice cannot be sustained. It is needless to go into a discussion of the reasons and public policy which forbid such a rule. These are fully developed in the authorities. *Freem. Judgm. secs. 116, 128*; 1 *Black Judgm. secs. 170, 270*; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Carpentier v. Oakland*, 30 Cal. 440; *Granger v. Clark*, 22 Me. 128; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Prince v. Griffir*, 16 Iowa, 552; *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Coit v. Haven*, 30 Conn. 190; *Clark v. Bryan*, 16 Md. 171; *Wingate v. Haywood*, 40 N. H. 437; *Galpin v. Page*, 1 Sawy. 309; *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 355; *Baker v. Stonebraker*, 34 Mo. 172; *Reed v. Pratt*, 2 Hill, 64; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520. See also a late case from Oregon—*Morrill v. Morrill*, 20 Or. 96, 11 L. R. A. 155, published in 23 Am. St. Rep. 95, with an elaborate note by Mr. A. C. Freeman, editor, and also author of *Freeman on Judgments*, citing many cases upon the subject." This was where the wife had been compelled to write and sign an authority for an attorney to appear, but the record appeared regular. But not so of a court of inferior or statutory jurisdiction.<sup>1</sup> Parol evidence is competent to show that an award of arbitration was in excess of the submission.<sup>2</sup>

*McAnear v. Epperson*, 54 Tex. 220;  
S. C. 38 Am. Rep. 625.

See *Frankel v. Satterfield*, 42 Alb. L.  
Jour. 156.

*Mastin v. Gray*, 19 Kans. 458; S. C. 27  
Am. Rep. 149.

*Tebbetts v. Tilton*, 31 N. H. 273.

<sup>1</sup> *Sears v. Terry*, 26 Conn. 273.

*Williamson v. Berry*, 8 How. 495.

*Gwin v. McCarroll*, 1 Sm. & M. 351.

*Shaefer v. Gates*, 2 B. Monr. 453.

<sup>2</sup> *Dodds v. Hakes*, 114 N. Y. 260.

In *Ferguson v. Crawford*, 70 N. Y. 253; S. C. 26 Am. Rep. 589, Rapallo, J., in an opinion of great research, admitting that nearly all decisions, *dicta*, and opinions of text-writers are to the effect stated in the rule last above, concludes that it is impossible to find any solid ground of distinction between foreign and domestic judgments, and that lack of jurisdiction renders void the judgment of any court, incurable by jurisdictional allegations, in the record, and making no estoppel against parol proof of fraud or want of jurisdiction. This opinion is so exhaustive, and so exceptional in its conclusions, that it may profitably be given in full:

“It is an elementary principle recognized in all the cases that to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as the subject-matter, and that the want of jurisdiction over either may always be set up against a judgment when sought to be enforced, or any benefit is claimed under it. There is no difference of opinion as to this general rule, but the point of difficulty is as to the manner in which this want of jurisdiction must be made to appear, in the case of a judgment of a domestic court of general jurisdiction, acting in the exercise of its general powers, when it comes in question in a collateral action. Whether, when the record is silent as to the steps taken to bring the parties into court, it may be proved by evidence that they were not legally summoned and did not appear; or whether, when the record recites that they were summoned or appeared, such recitals may be contradicted by extrinsic evidence; or whether the jurisdiction over the person and subject-matter is a presumption of law, which cannot be contradicted, unless it appears on the face of the record itself that there was a want of such jurisdiction, as in cases where the record shows that the service of process was by publication or some other method than personal.

“On these points there has been as much diversity of opinion, especially between the courts of this State and those of other States, as upon any general question which can be mentioned, although there has as yet been no authoritative adjudication in this State on the subject. It is well settled by our own decisions that in the case of a judgment of a court of general jurisdiction of a sister State, although it is entitled to the benefit of the presumption of jurisdiction which exists in favor of a judgment of one of our own courts, yet the want of jurisdiction may be shown



by extrinsic evidence, and that even a recital in the judgment record that the defendant was served with process, or appeared by attorney, or of any other jurisdictional fact, is not conclusive, but may be contradicted by extrinsic evidence. *Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30.

"And the same rule prevails in some of the other States in regard to the judgments of courts of sister States. Although some have held, even in regard to such a judgment, that if the record contains recitals showing jurisdiction, they cannot be contradicted. *Field v. Gibbs*, 1 Peters, C. C. 155; *Roberts v. Caldwell*, 5 Dana, 512; *Ewer v. Coffin*, 1 Cush. 23; *Rathbone v. Terry*, 1 R. I. 73; *Shelton v. Tiffin*, 6 How. 186.

"After considerable research, I have been unable to find a single authoritative adjudication, in this or any other State, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring States, holding that, in the case of such judgments, parties and privies are estopped in collateral actions, to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction, and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice.

"In *Cook v. Darling*, 18 Pick. 393, in an action of debt on a domestic judgment, the defendant pleaded that, at the time of the supposed service upon him of the writ in the original action, he was not an inhabitant of the State of Massachusetts; that he had no notice of the action, and did not appear therein.

"This plea was held bad on demurrer, on the ground that the judgment could not be impeached collaterally. In *Granger v. Clarke*, 22 Me. 128, also an action on a judgment, the plea was the same, with the addition that the judgment had been obtained by fraud; but it was held to constitute no defense. *Coit v. Haven*, 30 Conn. 190, was a *scire facias* on a judgment, and the defendant pleaded that the writ in the original action was never served upon him, etc.; and the court held in an elaborate opinion, that a judgment of a domestic court of general jurisdiction could

not be attacked collaterally, unless the want of jurisdiction appeared upon the face of the record, and that jurisdictional facts, such as the service of the writ and the like, were conclusively presumed in favor of such a judgment, unless the record showed the contrary, although this rule did not apply to foreign judgments, or judgments of the courts of sister States, or to domestic judgments of inferior courts, and that the only remedy in such a case was by a writ of error or application to a court of equity.

"The same rule is held in *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Wingate v. Haywood*, 40 N. H. 437; *Clark v. Bryan*, 16 Md. 171; *Callen v. Ellison*, 13 Ohio St. 446; *Horner v. Doe*, 1 Ind. 131; *Wright v. Marsh*, 2 G. Greene, 94, and *Prince v. Griffin*, 16 Iowa, 552, and in numerous other cases which are referred to in the case of *Hahn v. Kelly*, 34 Cal. 291, which adopts the same rule, and contains a full and instructive discussion of the question.

"There are many cases in other States, and in the courts of the United States, containing expressions general in their character, which would seem to sanction the doctrine that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence, and they are sometimes cited as authorities to that effect. *Elliott v. Piersol*, 1 Pet. 340; *Hollingsworth v. Barbour*, 4 Pet. 466; *Hickey v. Stewart*, 3 How. 750; *Shriver v. Lynn*, 2 How. 43; *Williamson v. Berry*, 8 How. 495; *Same v. Ball*, 8 How. 566; *Gwin v. McCarroll*, 1 Sm. & M. 351; *Enos v. Smith*, 7 Sm. & M. 85; *Campbell v. Brown*, 6 How. [Miss.] 106; *Shaefer v. Gates*, 2 B. Mon. 453; *Wilcox v. Jackson*, 13 Pet. 498; *Miller v. Ewing*, 8 Sm. & M. 421; and numerous other cases not cited. But an examination of these cases discloses that they all relate either to judgments of inferior courts, or courts of limited jurisdiction, or courts of general jurisdiction acting in the exercise of special statutory powers, which proceedings stand on the same footing with those of courts of limited and inferior jurisdiction (*Embury v. Conner*, 3 N. Y. 511), or courts of sister States, or to cases where the want of jurisdiction appeared on the face of the record, or to cases of direct proceedings to reverse or set aside the judgment. I have not found one that adjudicated the point now under consideration, otherwise than those to which I have referred. There are some cases which hold that the want of authority of an attorney to appear may be shown by extrinsic evidence, although the record states that an attorney appeared for the party, but those are placed expressly on the ground that such

evidence does not contradict the record. *Bodurtha v. Goodrich*, 3 Gray, 508; *Shelton v. Tiffin*, 6 How. 186; *Harris v. Hardeman*, 14 How. 340. Those cases are however in conflict with the decisions of this court, in *Brown v. Nichols*, 42 N. Y. 26, and in many other cases.

"The learned annotators of *Smith's Leading Cases*, Hare & Wallace, 1 Sm. L. Cases, vol. 1, p. 842 [marg.], sum the matter up by saying: 'Whatever the rule may be where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance, or a return of service by the sheriff in the record of a domestic court of general jurisdiction, is absolutely conclusive and cannot be disproved by extrinsic evidence.'

"It is quite remarkable however that notwithstanding the formidable array of authority in its favor, the courts of this State have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and the views of some of our most distinguished jurists, are directly opposed to it.

"As has been already stated, our courts have settled by adjudication in regard to judgments of sister States, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, and have further decided (in opposition to the holding of courts of some of the other States) that this may be done, even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and save in one case (*Kerr v. Kerr*, 41 N. Y. 272). have in their opinions made no discrimination between them. *Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148; *Noyes v. Butler*, 6 Barb. 613, and cases cited.

"When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister States in regard to this question, for under the provisions of the Constitution of the United States, which requires that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, it is now well settled

that when a judgment of a court of a sister State is duly proved in a court of this State, it is entitled here to all the effect to which it is entitled in the courts of the State where rendered. If conclusive there it is equally conclusive in all the States of the Union; and whatever pleas would be good to a suit therein in the State where rendered; and none others can be pleaded in any court in the United States. *Hampton v. M'Connel*, 3 Wheaton, 234; *Story Const.*, sec. 183; *Mills v. Duryee*, 7 Cranch, 481.

"In holding therefore that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such is the law of this State and the common law, and consequently, that in the absence of proof of any special law to the contrary in the State where the judgment was rendered, it must be presumed to be also the law of that State. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other States of the Union between the effect of domestic judgments and judgments of sister States, in regard to the conclusiveness of the presumption of jurisdiction over the person, is sought to be explained, by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another State he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the Constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation however does not remove the difficulty in making the distinction, for if there is a conclusive presumption that there was jurisdiction, that presumption must exist in one case as well as in the other. The question whether or not the party is estopped, cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another.

"But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments. The reasons are fully stated in the case of *Starbuck v. Murray*, 5 Wend. 148. In that case, which was an action upon a Massachusetts judgment, the defendant pleaded that no process was served on him in the suit in which the judgment sued on was ren-

dered, and that he never appeared therein in person or by attorney, and this plea was held good, notwithstanding that the record of the judgment stated that the defendant appeared to the suit. Marcy, J., in delivering the opinion of the court, and referring to the argument that the defendant was estopped from asserting anything against the allegation of his appearance contained in the record, says: 'It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts, with one exception, agree in opinion that the paper introduced, as to him, is no record. But if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiff in effect declares to the defendant the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact.' And again, at page 160, he says: 'To say that the defendant may show the supposed record to be a nullity, by showing a want of jurisdiction in the court which made it, and at the same time to estop him from doing so because the court has inserted in the record an allegation which he offers to prove untrue, does not seem to me to be very consistent.'

"This is but an amplification of what is sometimes more briefly expressed in the books, that where the defense goes to defeat the record, there is no estoppel. That the reasoning of Marcy, J., is applicable to domestic judgments, is also the opinion of the learned annotators to Phillips' Evidence. (Cowen and Hill's notes [1st ed.] p. 801, note 551.) Referring to the opinion of Marcy, J., before cited, they say: 'The same may be said respecting any judgment, sentence or decree. A want of jurisdiction in the court pronouncing it may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case.' The dicta

of our judges are all to the same effect, although the precise case does not seem to have arisen. In *Bigelow v. Stearns*, 19 Johns. 41, Spencer, Ch. J., laid down the broad rule that if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. In *Latham v. Edgerton*, 9 Cow. 227, Sutherland, J., in regard to a judgment of a court of common pleas, says: 'The principle that a record cannot be impeached by pleading, is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced or where any benefit is claimed under it.' Citing *Mills v. Martin*, 19 Johns. 33. He also says (page 229): 'The plaintiff below might have applied to the court to set aside their proceedings, but he was not bound to do so. He had a right to lie by until the judgment was set up against him, and then to show that the proceedings were void for want of jurisdiction. In *Davis v. Packard*, 6 Wend. 327, 332, in the Court of Errors, the Chancellor, speaking of domestic judgments, says: 'If the jurisdiction of the court is general or unlimited both as to parties and subject-matter, it will be presumed to have had jurisdiction of the cause unless it appears affirmatively from the record, *or by the showing of the party denying the jurisdiction of the court*, that some special circumstances existed to oust the court of its jurisdiction in that particular case.' In *Bloom v. Burdick*, 1 Hill, 130, Bronson, J., says: 'The distinction between superior and inferior courts, is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered;' and in *People v. Cassels*, 5 Hill, 164, 168, the same learned judge makes the remark, that no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts upon which jurisdiction depends. In *Harrington v. People*, 6 Barb. 607, 610, Paige, J., expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in *Noyes v. Butler*, 6 Barb. 613, 617, and in *Hard v. Shipman*, 6 Barb. 621, 623, 624, where he says of superior as well as inferior courts, that the record is never conclusive as to the recital of a jurisdictional fact, and the defendant is always at liberty to show

a want of jurisdiction, although the record avers the contrary. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth a record. Citing *Starbuck v. Murray*, 5 Wend. 158. The language of Gridley, J., in *Wright v. Douglass*, 10 Barb. 97, 111, is still more in point. He observes: 'It is denied by counsel for the plaintiff, that want of jurisdiction can be shown collaterally to defeat a judgment of a court of general jurisdiction. The true rule, however, is that laid down in the opinion just cited (op. of Bronson, J., in *Bloom v. Burdick*, 1 Hill, 138 to 143), that in a court of general jurisdiction, it is to be presumed that the court has jurisdiction till the contrary appears, but the want of jurisdiction may always be shown *by evidence*, except in one solitary case,' viz.: 'When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding.'

"The General Term, in that case, held that a judgment of the Supreme Court was void for want of service of an attachment, notwithstanding that the record averred that the attachment had been duly served and returned, according to law. The judgment in the case cited was reversed (7 N. Y. 564), but not upon the point referred to here. It cannot, however, be held to be an adjudication upon that point, because the judgment was not rendered in the exercise of the general powers of the court, but in pursuance of a special statutory authority.

"In *Chemung Canal Bank v. Judson*, 8 N. Y. 254, the general principle is recognized, that the jurisdiction of any court exercising authority over a subject may be inquired into, and in *Adams v. Saratoga & Washington R. Co.*, 10 N. Y. 328, 333, Gridley, J., maintains as to the judgments of all courts, that jurisdiction may be inquired into, and disproved by evidence, notwithstanding recitals in the record, and says that such is the doctrine of the courts of this State, although it may be different in some of the other States, and perhaps also in England; and he says the idea is not to be tolerated, that the attorney could make up a record or decree, reciting that due notice was given to the defendant of a proceeding, when he never heard of it, and the decree held conclusive against an offer to show this vital allegation false. That was a case of a special proceeding, and, therefore, not an authority

on the point. In *Pendleton v. Weed*, 17 N. Y. 75, where a judgment of the Supreme Court was sought to be attacked collaterally, it is said by Strong, J.: 'It is undoubtedly true that the want of jurisdiction of the person is a good defense in answer to a judgment when set up for any purpose, *and that such jurisdiction is open for inquiry*;' and by Comstock, J., at p. 77: 'I assent to the doctrine that where there is no suit or process, appearance or confession, no valid judgment can be rendered in any court; that in such a case *the recital in the record of jurisdictional facts is not conclusive*.' Citing *Starbuck v. Murray*. 'I think it is always the right of a party against whom a record is set up, to show that no jurisdiction of his person was acquired, and consequently that there was no right or authority to make up the record against him.' *Selden and Pratt, JJ.*, concurred in these views, but the case was disposed of on a different point.

"In *Porter v. Bronson*, 29 How. Pr. 292, and S. C. 19 Abb. Pr. 236, the Court of Common Pleas of the City of New York held, at General Term, that assuming the Marine Court to be a court of record, a defendant in an action on a judgment of that court might set up that he was not served with process and did not appear, notwithstanding recitals in the record showing jurisdiction; and in *Bolton v. Jacks*, 6 Robt. 198, Jones, J., says that it is now conceded, at least in this State, that want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom a judgment is offered, is not by the bare fact of such recitals estopped from showing, by affirmative proof, that they were untrue, and thus rendering the judgment void for want of jurisdiction. He cites in support of this opinion, several of the cases which I have referred to, and *Dobson v. Pearce*, 12 N. Y. 164, and *Hatcher v. Rocheleau*, 18 N. Y. 92.

"It thus appears that the current of judicial opinion in this State is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Robt. 198, and if adopted here, is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained, it must rest upon the local law of this State, as it finds no support in adjudications elsewhere.



There are reasons however founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those States where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity.

“The technical difficulty arising from the conclusiveness of the record is thus obviated. In the present case the judgment is set up by the defendants as a bar to the plaintiff’s action. But it must be borne in mind, that this is an equitable action, being for the foreclosure of a mortgage. The defendants set up the foreclosure in the McFarquhar case as a bar, but being in a court of equity, the plaintiff had a right to set up any matter showing that the defendants ought not in equity to avail themselves of that judgment. They offered to show that it was entered *ex parte* on forged papers. It does not appear that the plaintiff ever had any knowledge of it, and it is not pretended that he was legally summoned. Such a judgment would never be upheld in equity, even in favor of one ignorant of the fraud and claiming *bona fide* under it. He stands in no better position than any other party claiming *bona fide* under a forged instrument.

“The case is analagous in principle to that of the Bridgeport Savings Bank v. Eldredge, 28 Conn. 557. That was a bill filed by a second mortgagee to redeem mortgaged premises from a first mortgagee. The first mortgagee had obtained a degree of foreclosure against the second mortgagee, and the time limited for redemption had expired. The record of the decree found the fact that legal service of the bill in the first suit had been made on the second mortgagee, but in fact none had been made, and he had no actual knowledge of the pendency of the suit until after the time limited for redemption had expired; and he would have redeemed if he had known of the decree.

“It was held: 1. That the decree was not in any proper sense a bar to the present suit, as a judgment at law would be a bar to a suit at law; but that, without impugning the decree, the

court could, for equitable reasons shown, allow a further time for redemption.

"That therefore the question whether the plaintiff could contradict the record by showing that no service of the bill was, in fact, made upon him, did not present itself as a technical one, to be determined by the rules with regard to the verity of judicial records, but only in its relation to the plaintiff's rights to equitable relief, and therefore that evidence of want of notice was admissible.

"The bill to redeem was not framed to open the former decree and contained no allegations adapted to or praying for such relief, but was in the ordinary form of a bill for redemption, taking no notice of the previous decree. The decree was set up in the answer, and it was averred that it was rendered on legal notice to the plaintiff. The court however held that this defense might be rebutted by evidence of facts which should preclude defendants from taking advantage of a decree of which they could not conscientiously avail themselves."

This doctrine was also enunciated in *Mastin v. Gray*, 19 Kans. 458; S. C. 27 Am. Rep. 149. Valentine, J., said:

"Where the record is silent on the subject, a majority of the courts hold that the record may be impeached collaterally as well as directly, and by extrinsic as well as internal evidence. And a great majority of the courts hold that a judgment from another State may be impeached for want of jurisdiction collaterally as well as directly, and by extrinsic evidence as well as by the record itself. \* \* \* But the difficult question to determine arises when it is attempted to impeach a domestic judgment collaterally, and by extrinsic evidence. There are authorities which hold that it cannot be done. \* \* \* While there are other authorities which hold that it may be done. \* \* \* And there are many authorities which tend to uphold the doctrine that any judgment rendered without jurisdiction may be impeached in any proceeding; and that in doing so, anything contained in the record (of which such judgment forms a part) purporting to give or prove jurisdiction, such as the recital of a sheriff's return, or service of summons, or a service by publication, or any constructive service, or any appearance by attorney, or a finding by the court of such service, notice, or appearance, may be impeached and contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be untrue and false.

"The decisions upon the question which we are now discussing are conflicting and contradictory, and of course they cannot all be good law. \* \* \*

"The theory that a judgment from a sister State is entitled to the same faith and credit as a domestic judgment, is unquestionably correct. It is sustained by all the authorities, from the decision in the case of *Mills v. Duryee*, 7 Cranch, 484, down to the present day. And of course if a domestic judgment cannot be impeached collaterally, and by extrinsic evidence, a judgment from a sister State cannot be so impeached. But the authority is now overwhelming that a judgment from a sister State may be so impeached. \* \* \*

"We also think that all decisions of State courts allowing judgments from other States to be impeached collaterally, and by extrinsic evidence, are applicable to this case. It is now settled beyond all controversy that judgments from sister States, wherever they can be used, are entitled to the same faith and credit as domestic judgments. That is, although an execution cannot be issued upon them directly, nor are they liens upon real estate directly, yet when they are sought to be used as evidence, or as the foundation for other actions, they are entitled to the same faith and credit as domestic judgments. Now as nearly all courts hold that judgments from sister States may be impeached collaterally for want of jurisdiction, and by extrinsic evidence, it is substantially a holding that domestic judgments may also be impeached under like circumstances. Proceedings instituted for the purpose of destroying, impairing, or modifying the force or effect of a judgment for all cases, such as proceedings to reverse, vacate, set aside, declare void, suspend, modify, or perpetually enjoin a judgment, are direct proceedings. But a proceeding instituted for some other purpose, and in which the question of the force or effect of the judgment arises only incidentally, is a collateral proceeding. A judgment rendered with jurisdiction can never be impeached in a collateral proceeding; but a judgment rendered without jurisdiction may. In fact, a judgment rendered without jurisdiction is no judgment at all. A judgment cannot be rendered against any person until he has had his day in court, and until he has had an opportunity to be heard. To say that the record of a judgment can conclusively prove that any person was a party to the action in which it was rendered, and then to say that the judgment is conclusively valid because he

was a party, is to reason illogically. It is begging the question. It is reasoning in a circle. That is, the judgment proves that he was a party, and being a party, proves the validity of the judgment." \* \* \* Horton, C. J., said: "While it is not to be denied there are numerous decisions of most respectable courts sustaining another rule, in my judgment the conflicting decisions are based upon insufficient and unsatisfactory reasons. \* \* \* The ablest of the opinions, holding adverse views, concede they violate all principles of natural justice, but attempt to fortify their forced conclusions on the plea of public policy."

In *Needham v. Thayer*, 147 Mass. 536, it was held that under the fourteenth amendment of the Federal Constitution, a defendant in an action upon a domestic judgment *in personam* may impeach it by proof that he was a non-resident and was not served with process, and did not appear in the first action.<sup>1</sup>

*Limitations of the rule—strangers:* The rule applies only to parties or privies to the judgment who may take measures to set it aside or reverse it, and not to strangers, who show that they have a pre-existing, real and substantial interest in avoiding it, and one which the law is bound to protect.<sup>2</sup>

*Indemnitors and sureties:* Nor does the rule apply as to indemnitors or sureties in the case of a judgment taken by consent of the immediate parties, although without fraud. The controversy must be real, and the issue must be really contested.<sup>3</sup> This doctrine is very admirably expressed by Andrews, J., in *Conner v. Reeves*, 103 N. Y. 527, a case of unique impression, as follows:

<sup>1</sup> In an article in 22 Albany Law Journal, 244, entitled "Remedy against Judgment Suffered by Unauthorized Attorney," the writer comes to the following conclusions:

"1. A judgment of another State or country, rendered upon an unauthorized appearance, without service of process, is void, and may be collaterally attacked.

"2. A domestic judgment, rendered upon an unauthorized appearance, without service of process, is void, and may be attacked collaterally or through equity, without regard to the responsibility of the attorney making the appearance.

"3. A domestic judgment, rendered

upon an unauthorized appearance, with service of process, is voidable, and may be set aside or relieved against by a direct application, if the attorney is irresponsible, but not otherwise."

<sup>2</sup> Black Judgm. § 260.

*Atkinson v. Allen*, 12 Vt. 619; S. C. 36 Am. Dec. 361.

*Eureka Iron Works v. Bresnahan*, 66 Mich. 489; 33 N. W. Rep. 834.

*Caswell v. Caswell*, 28 Me. 232.

<sup>3</sup> *Met. El. Ry. Co. v. Manhattan Ry. Co.* 14 Abb. N. C. 217.

*Webster v. Reid*, 11 How. 437.

*Gaines v. Relf*, 12 How. 472.

“The covenantor in an action on a covenant of general indemnity against judgments, is concluded by the judgment recovered against the covenantee, from questioning the existence or extent of the covenantee’s liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity, to make the right of the covenantee to maintain an action on the covenant, to depend upon the result of the re-trial of an issue which as against the covenantee had been conclusively determined in the former action, ‘always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety.’ Cowen, J., *Douglass v. Howland*, 24 Wend. 36, 55. The general doctrine above stated is fully settled by authority. *Chace v. Hinman*, 8 Wend. 452; *Gilbert v. Wiman*, 1 N. Y. 550; *Methodist Churches of New York v. Barker*, 18 N. Y. 463; *Rapelye v. Prince*, 4 Hill, 119, 120; *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275, 280; *Douglass v. Howland*, *supra*. This case however presents a feature, which so far as I know, is not found in any of our reports. The judgment in the action of Kahrs against the sheriff was entered by consent. The action, after issue had been joined, was put on the calendar, where it remained for several months. Dubee, one of the obligors of the indemnity bond, and the plaintiff in the execution against Fischer, was notified of the action, and was consulted by the sheriff in respect to the litigation. It was found that there was difficulty in procuring witnesses to establish the defense, and it was finally agreed between Kahrs, Conner and Dubee that judgment should be taken in the action in favor of Kahrs, for \$500, and pursuant to this agreement, and by the consent of the parties thereto in open court, judgment was entered. The question is whether a judgment obtained under these circumstances, established a breach of the contract of indemnity, and justified the court in directing a verdict for the plaintiffs.

“The defendants neither proved nor offered to prove that there was any defense in fact to the action of Kahrs, or that the judgment exceeded the sum which Kahrs was entitled to recover against the sheriff, or that the agreement for the adjustment of the amount, or the consent to the entry of the judgment, was fraudulent or collusive. The appellants must fail on this appeal, unless they can maintain the proposition that the judgment

against the sheriff furnished neither conclusive nor presumptive evidence of a breach of the condition of the bond, or in other words, that a judgment rendered by consent was not a judgment or adjudication within the meaning of the bond. The question is not free from difficulty, but we are of opinion that the judgment, in the absence of any evidence of fraud or collusion, or any suggestion that there was a defense to the action against the sheriff, although entered upon consent of the parties to the action, presumptively at least established the liability of the defendants. The defendants executed the bond at the request and for the accommodation of Dubee. Its obvious purpose was to secure the sheriff against apprehended litigation as to the title to the property seized under the execution against Fischer. The bond was given to indemnify the sheriff against suits and judgments to which he should be a party growing out of that proceeding. The appellants did not make it a condition of their liability that they should have notice. They were satisfied that the sheriff should conduct litigations founded upon his seizure of the property without reserving any right of intervention. They committed the matter to his discretion, not indeed by express words, but by necessary implication. It is true that the sheriff was not in a legal sense the agent of the sureties to manage suits brought against him, but the sureties agreed that no judgments should be recovered against him therein. They did not limit the indemnity to judgments obtained upon an actual trial or after a contest in court, and they did not undertake to divest the sheriff of the power incident to his position as a party, to settle and adjust litigations instituted against him in view of the exigencies of the situation. It might very well happen that a judgment founded upon a compromise or agreement without actual trial would best promote the interests of all concerned. Can it be affirmed, as a matter of law, that the conditions of the bond only covered judgments obtained upon hostile and adverse litigation, and that no discretion was left in the sheriff to consent to a judgment, although he believed that by so doing money would be saved to the parties ultimately liable? This we think would be a too strict interpretation of the contract. But at the same time to hold that a judgment entered by consent of the parties, and without notice to or approval by the sureties, is, in the absence of proof of fraud or collusion, conclusive against them, would open the door to the perpetration of secret frauds and subject sureties to a most hazardous responsi-

bility, and to the discretion and judgment of a third person, which might seriously imperil them. A judgment by default has been held to be covered by an indemnity against judgments. *Lee v. Clark*, 1 Hill, 56; *Aberdeen v. Blackmar*, 6 id. 324; *Annett v. Terry*, 35 N. Y. 256. But where default is made the plaintiff must give proof to entitle him to judgment. While we are of opinion that the sheriff was not excluded from the protection of the indemnity by reason of the fact that the judgment was taken by his consent, we think the reasonable rule is that a judgment so obtained is presumptive evidence only against the sureties, and that they are at liberty to show that it was not founded upon any legal liability to the plaintiff in the action, or exceed such liability. We are not aware that this point has been adjudicated in our court, but this conclusion is warranted, we think, by legal and equitable considerations. In this case there is an absence of any proof impeaching the fairness or justice of the claim of Kahrs, or tending to show that the judgment exceeded the legal liability of the sheriff."

### Sec. 123. Identification of parties.

Parol evidence is competent to identify the parties.<sup>1</sup>

### Sec. 124. Lost judgment.

Parol evidence is admissible to prove that the record of a judgment has been lost or destroyed, and to show its contents.<sup>2</sup>

"If it was lost or destroyed he had the same right to give secondary evidence of the contents of it, as in the case of any other instrument in writing incapable of production for those reasons." *Folger, J., in Mandeville v. Reynolds*, 68 N. Y. 528.

The same is true of an execution.<sup>3</sup>

<sup>1</sup> *Garwood v. Garwood*, 29 Cal. 514.

<sup>2</sup> *Mandeville v. Reynolds*, 68 N. Y. 528.

*Jackson v. Cullum*, 2 Blackf. 228; S. C.

18 Am. Dec. 158.

*Stockbridge v. West Stockbridge*, 12

Mass. 400.

*Newcomb v. Drummond*, 4 Leigh, 57.

*Mason v. Bull*, 26 Ark. 164.

*Bailey v. Martin*, 15 Lea, 103.

*Ames v. Hoy*, 12 Cal. 11.

*Parry v. Walser*, 57 Mo. 169.

*Renner v. Bank*, 9 Wheat. 581.

<sup>3</sup> *Leland v. Cameron*, 31 N. Y. 115.





## CHAPTER XXI.

## WILLS.

- Sec. 126. Explanation of ambiguities.  
127. Deciphering.  
128. Ademption.  
129. Oral will.  
130. Revivor and revocation.  
131. Lost will.

**Sec. 126. Explanation of ambiguities.**

1. Where the object of a testator's bounty, or the subject of disposition, is described in terms applicable, indifferently, to more than one person or thing, for the purpose of ascertaining the beneficiary, identifying the thing bestowed, or determining the quantity of interest given, in a will, the court may inquire into every material fact relating to the claimant, the property claimed, and the circumstances and affairs of the testator and his family, and the claimant; and the testator's declarations before, at, or after the making of the will, are admissible in this view; but no evidence of mere mistake on the part of the testator or the draftsman is admissible.

2. A description partly false may be made operative by rejecting the false part, provided the remaining portion reasonably corresponds with the person, thing, or interest indicated by such extrinsic evidence; but no words can be added to any description:

*Wigram's propositions:* Vice-Chancellor Wigram, in his valuable treatise on Extrinsic Evidence in respect to Wills, lays down and treats the subject under the following propositions:

**"PROPOSITION I.**

"A testator is always presumed to use the words in which he expresses himself, according to their strict and primary accepta-

tion, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

“PROPOSITION II.

Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

“PROPOSITION III.

“Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible, with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

“PROPOSITION IV.

“Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words.

“PROPOSITION V.

“For the purpose of determining the object of a testator's bounty or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of

his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words.

#### " PROPOSITION VI.

"Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see proposition seven) will be void for uncertainty.

#### " PROPOSITION VII.

"Notwithstanding the Rule of Law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined: "Where the object of a testator's bounty, or the subject of disposition (*i. e.* the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

*Taylor's rules:* Taylor (2 Ev. § 1226) lays down these rules: "First, where, in a written instrument, the description of the person or thing intended *is applicable with equal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author. Secondly, if the description of the person or thing be *partly applicable and partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible. Thirdly, if the description be partly correct and partly incorrect, and the correct

part be sufficient of itself to enable the court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement. Fourthly, if the description be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe. Fifthly, if the language, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect."

*Chaplin's rules*: The very latest compiler and writer on the subject of wills, Mr. Stewart Chaplin ("Principles of the Law of Wills, with Selected Cases," New York, 1892), observes: "To sum up, then, extrinsic evidence may be given to translate, or decipher; or to show the facts relating to the person claiming, or the thing claimed, under the will. Next, where there is any ambiguity, that is, any double meaning, it is either patent or latent. If patent, the underlying facts may be shown in order to put the judge, so to speak, into the atmosphere surrounding the testator. If, in the light of these facts, the term used is sensible, it must be applied without any direct evidence of *intent*; if insensible, the provision must fail. If latent, then in all the cases the underlying *facts* may here also be shown. If in their light the meaning is sufficiently clear to satisfy the mind of the judge, it must be applied; if still insensible, the provision fails. Thus far the rules concerning latent and patent ambiguities are alike. In the one particular class of latent ambiguities known as *equivocations*, already described, further extrinsic evidence of *intent* is admitted.

"Thus it appears that extrinsic evidence of the *facts* is admitted in all cases of both latent and patent ambiguities, while extrinsic direct evidence of intent is admissible in only one class of latent ambiguities. And this is all there is in the rule concerning latent and patent ambiguities."

In regard to our first rule, except as to the point of the *time* of admissible declarations there is comparatively little conflict in the authorities.

In regard to the second rule, although there is no conflict as to the doctrine of the rejection of the false part of a description,

there is some difference on the question as to when, after such rejection, enough remains to identify the subject or the object.

Leaving the question of admissibility of declarations as affected by the time when made, the rules above given are illustrated by the following principal

*Corroborative authorities:* 1. One of the earliest and most celebrated cases is *Selwood v. Mildmay*, 3 Vesey, Jr., 306. The testator bequeathed "£4 per cent. stock," whereas, several years before he made this will, he had sold out that stock, and purchased long annuities with the produce. The draftsman was allowed to testify that the testator gave him, as a part of his instructions, a former will, containing similar provisions, without informing him of the change in the form of the securities, and consequently the mistake arose. It also appeared that testator had no other stock. The bequest was held to carry the long annuities.

2. In *Doe de LeChevalier v. Huthwaite*, 3 B. & Ald. 632, the testator devised to Stokeham Huthwaite, second son of John Huthwaite, for life, with remainder to his first and other sons and daughters, in strict settlement; and in default of such issue, to John Huthwaite, third son of the above-mentioned John Huthwaite, for life, etc. In fact, Stokeham was the third son of John Huthwaite, and John, the devisee, was his second son. The court admitted evidence of the state of the testator's family and other circumstances, and left it to the jury to determine whether a mistake was made. Wigram thinks that the doctrine *falsa*, etc., cannot apply to this case, but it is hard to see why not. By dropping the words "second" and "third," a perfect description is left, and it was undoubtedly in the order of birth, rather than in the christened names, that the testator made his mistake. But leaving it as a question of fact was the correct ruling.

3. In *Mosley v. Massey*, 8 East, 149, the testator had an estate in the county of Monmouth, of which he was seized in fee in possession. He had another estate in the county of Radnor, of which he was seized in fee, subject to the uses of his marriage settlement, by which he had covenanted to convey to the use of himself and wife for life, remainder to his first and other sons in tail. By his will, misreciting his estate in fee in possession to be in Radnor, and his disposable reversion in the other fee to be in Monmouth, he devised his estate so misdescribed as being in Radnor to his wife for life, remainders to his sons and daughters;

and devised his estate so misdescribed as being in Monmouth, after the death of his wife and only son, without issue, to his daughter, etc. The will described the estate so misdescribed as being in Monmouth, as formerly belonging to his uncle, and the testator had no other estate in either county. The Court of King's Bench, the case being sent for their opinion by the Lord Chancellor, held, Lord Ellenborough presiding, that enough appeared, independent of the local description, to enable them to effectuate the devisor's plain intent.

4. In *Thomas v. Thomas*, 6 T. R. 671, the devise was "to my granddaughter, Mary Thomas, of Llechlloyd, in Merthyr parish," etc. The testator had a granddaughter, Elinor Evans, residing at that place, and a great granddaughter, Mary Thomas, residing at Green, parish of Llangam, some miles distant. Parol evidence was admitted to show, that when the will was read over to the devisor, he said there was a mistake in the name of the devisee, but there was no need of altering it, because the place of abode sufficiently indicated what he meant. This was supported by Lord Kenyon.

5. In *Hodgson v. Hodgson*, 2 Vern. 593, land was devised, charged with payment of "£100 he owed to one Shaw." It turned out that the money was not due to Shaw, but to Alice Beck, wife of one Fitch. The devisee refusing to pay the money, the Lord Chancellor allowed the draftsman to testify that the testator declared that he meant the £100 due to the person who married Mr. Beck, of Lincoln, and another witness deposed that he said he meant the debt for which C. was bound as surety.

6. *Beaumont v. Fell* is a very celebrated case (2 P. Wms. 141). Testator gave a legacy to Catherine Earnley. There was no one of that name, but Gertrude Yardley claimed the legacy. It appeared that when he made his will the testator's voice was very low; that he usually called the legatee "Gatty"; that the scrivener not fully understanding whom he meant was referred by testator to J. S. and wife for information, who afterward declared that Gertrude Yardley was intended. The court laid stress on the resemblance in sound between "Gatty" and "Katy," and the legacy was given to Gertrude Yardley.

7. In *Morgan v. Morgan*, 1 Crompt. & M. 235, the testator devised certain property to his nephew Morgan Morgan, and other property to his nephew Morgan Morgan of the village of Mothvey. He had two nephews of this name, one of whom lived at Moth-

vey, and the other elsewhere. It was contended that it was to be presumed that the testator, in making the distinction apparent in this description, had different persons in his contemplation, and that this being apparent on the face of the will, parol evidence to the contrary was inadmissible; but the court held that evidence was admissible of the testator's oral declarations made at the execution of the will.

8. In *Miller v. Travers*, 8 Bing. 244, the testator devised all his freehold and real estates whatsoever, situate in the county of Limerick and in the city of Limerick. He had real estate in the city of Limerick and in the county of Clare, but none in the county of Limerick. The vice-chancellor admitted evidence to show that the testator *intended* to devise his estate in Clare, and that the word Limerick was inserted by mistake. On appeal, this was reversed. Wigram says, at paragraph 177, that the question raised was whether evidence to prove *intention*, as distinguished from explanatory evidence, was admissible. The gist of the decision was contained in these words: "There are no words in the will which contain an imperfect, or indeed any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare, but in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself." The doctrine *falsa*, etc., is explicitly recognized. *Selwood v. Mildmay* is approved, on the ground that it was a bequest of stock, and the descriptive words might be rejected. The case of *Goodtitle v. Southern*, 1 M. & S. 299, was also approved, in which the devise was of "all that my farm, called Trogue's Farm, now in the occupation of A. C." The farm turned out to be in other occupation, but the devise was held effectual. So of *Day v. Trigg*, 1 P. Wms. 286, where the devise was of "all the testator's freehold houses in Aldersgate street," when in fact he had only leasehold houses there. The court say a part of the description which is inaccurate may be rejected, where there is a sufficient description to ascertain the thing devised, but nothing can be added.

9. In *Doe d. Oxenden v. Chichester*, 4 Dow. Parl. Rep. 65, parol evidence was held inadmissible to show that in a devise of "my estate of Ashton," the testator intended to include lands in adjoining parishes which he had been used to call his Ashton estate.

10. In *Newburgh v. Newburgh*, 5 Madd. 364, it was held, that parol evidence was inadmissible to show that in a devise of lands in Sussex the testator intended to embrace lands in Gloucester, which latter word was omitted by mistake.

11. In *Hiscocks v. Hiscocks*, 5 M. & W. 363, there was a devise to testator's son John for life; from his decease to testator's grandson, John H., *eldest son* of the said John H. for life, with remainders over. At the time of the making of the will, testator's son, John H., had been twice married. By his first wife he had one son Simon, by his second an eldest son John and younger sons and daughters. Simon and John both claimed the lands. The question was, whether evidence of the testator's *intention*, consisting of instructions given for his will, and declarations made by him after his will, were admissible. The evidence was held inadmissible, but the court say: "If therefore by looking at the surrounding facts, to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor or the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that for this purpose they cannot receive declarations of the testator of what he intended to do in making his will."

12. In *Lindgren v. Lindgren*, 9 Beav. 358, testatrix bequeathed "£500 of the stock 3 per cent. consols now standing in my name in the books of the Bank of England." She also bequeathed £100 of "said 3 per cent. consols" to each of five other persons, and there was a residuary clause. She had no stock whatever at the time of making the will nor afterward, but it appeared that three years before she had possessed £1,000 of that stock, which she had sold out, and the proceeds she had lent to plaintiff, who by agreement paid her therefor the interest which she had realized, from the stock. The bequest was held to carry the money. The case was decided on the authority of *Selwood v. Mildway*, which was held not to be overruled by *Miller v. Travers* or *Hiscocks v. Hiscocks*.

13. In *Grant v. Grant* the devise was "to my nephew, Joseph Grant," and the testator appointed "my said nephew, Joseph Grant," his executor. The testator had a nephew Joseph Grant, son of his brother William, but he did not know of this nephew's name or existence, nor was he on friendly terms with this brother. The testator's wife also had a nephew of the same name, who had



been brought up by the testator from the age of ten years, and had for fifteen years resided in his family and assisted him in the management of his business. The testator was in the habit of calling this latter person "his nephew," and had frequently declared his intention of making him his heir, and of cutting off his brother's family. The case first came before the courts on an application for letters testamentary in 1869, and Lord Penzance admitted evidence of all the foregoing facts, and granted letters to the wife's nephew (39 L. J. R. N. S. 17). He says: 'It is said that the court is bound by the primary signification of words used in a will, and that nothing but the primary signification in its strictest sense can be resorted to, unless that signification would produce some absurdity, or render the meaning insensible. A proposition of this kind is no doubt to be found in Sir James Wigram's book; but a great deal turns upon the question, what is meant by the expression 'primary signification?' It will not do to carry it too far. When a man makes his will it is fair to presume that he uses ordinary language in its ordinary sense, and if the original signification of a word is scrupulously followed in all cases, to the exclusion of that which by the common consent and use of mankind it has in process of time acquired, the court would be carried, in some cases, a long way from the testator's intention in the endeavor strictly to follow it.' He cites the admission of proof of custom in certain localities to affix particular meaning to certain words, in the construction of contracts, and claims that the like proof should apply in cases of wills and of the custom of individual testators. He admits that the word "nephew," when used in a will to describe a class of beneficiaries, includes only the sons of brothers or sisters of the testator; "but this," he says, "does not appear to me to preclude a wider signification being attached to the word when used as an additional description of a person specified by name, to whom the word is in an ordinary and popular sense applicable."

The case next came up in 1870, in an action of ejectment, in the common pleas, on a case stated, and a construction of the devise was given (39 L. J. R. N. S. 140). The parol evidence was admitted, and the devise held to intend the wife's nephew. Chief Justice Bovill concedes that there is no ambiguity on the face of the will, but admits the evidence to *identify* the party intended to be described, "just in the same way as such evidence is admissible to identify and to show what was the subject-matter

devised." He inclines to the opinion that the word "nephew" has no definite legal signification, but he is clear that even if it has the strict signification claimed, still the fact that it was used by the testator to describe the wife's nephew is conclusive. On appeal from this judgment of the common pleas to the exchequer chamber, it was unanimously affirmed, without hearing the respondent's counsel (39 L. J. R. N. S. 272). Chief Baron Kelly thinks that although in its strict and original sense, the word "nephew" means a brother's or sister's son, yet in an ordinary and popular sense, it may mean a wife's sister's son. He declined giving any opinion as to the testator's habit of calling the respondent his nephew, but laid great stress on his relations with the respective claimants. Martin, B., and Channell, B., were of the same opinion, and so were Mellor, J., and Clesby, B. Blackburn, J., was of the same opinion, but doubted whether the proof of testator's habit of calling defendant "his nephew" was admissible, and held the evidence of his declarations inadmissible; but in the remainder of the extrinsic evidence he finds ample warrant for his judgment. As he puts it: "The testator may be supposed to be talking of his family affairs, and saying: 'I am speaking of my family and family matters; I have adopted, and have living with me, and conducting my business, Joseph Grant, the son of my wife's brother; I have a brother of whose family I know nothing, and of whose children's names and existence I am ignorant, and I leave this property to my nephew, Joseph Grant.'" In short, although there was a person strictly answering the testator's description in *every* particular, and in *every* sense of the words used, yet as there was another person answering the same description in the same particulars, in *one* sense of the words used, and it was evident, from the circumstances, that the testator intended this latter person, the court held the latter to be the person intended in law. In *Still v. Hoste, Madd. & G. 192*, it was left to a master to inquire whom the testator meant by "Sophia Still, the daughter of Peter Still," when Peter had only two daughters, Selina and Mary. The vice-chancellor said: "There can be little doubt that Selina Still is entitled to the legacy." And so in *Careless v. Careless, 1 Meriv. 383*, where there was a legacy to "Robert Careless, my nephew, son of Joseph Careless, and the testator had two nephews Robert, one the son of John C. and the other of Thomas C., and had no brother Joseph, and there was

no other Joseph C., parol evidence was admitted to show that he meant Robert, son of John C.

14. In *Townsend v. Downer*, 23 Vt. 225, an action of ejectment, the devise was of "a certain right of land which I purchased, lying on the main, supposed to be in Vermont." The court held that a devise is never void for uncertainty, upon the mere ground that the description is indefinite, but only when, after resort to parol proof, the subject still remains mere matter of conjecture.

15. In *Asylum v. Emmons*, 3 Bradf. 144, testatrix bequeathed "her shares of the Mechanics' Bank stock" to the asylum. She had no stock but City Bank stock, and that was held to be carried by the bequest.

16. In *Jackson v. Sill*, 11 Johns. 201, the devise was of "the farm which I now occupy, together with the crops," etc. The devisor occupied one farm and owned another, occupied by B, in Watervliet. He also devised land obtained of R "adjoining my said farm." In this action of ejectment the defendant offered to prove by the draftsman the declarations of the testator that he meant to include his farm in Watervliet in this devise, and offered other proof of the same purport, which was rejected. The decision was right, because after rejecting the words "which I now occupy," enough is not left to specify any subject, and the remaining words were already satisfied by "the farm" which he *did* occupy. "Had the devise been of *my farm at Watervliet* which I now occupy," the court say this would have afforded application for the doctrine *falsa*, etc.

17. In *Allen v. Lyons*, 2. Wash. C. C. 475, the devise was of "his house and lot on Third street, in the occupation of R. H." The deviser owned no house in Third street, but owned one in Fourth street which was occupied by R. H. Held, that the devise might be effectuated by dropping entirely the reference to the street.

18. In *Winkley v. Kaime*, 32 N. H. 268, the devise was of "thirty-six acres more or less of lot thirty-seven, in the second division of Barnstead, being same I purchased of John Peavey." It appeared that there was no such lot in that division, but that testator owned land in lot ninety-seven of that division, exactly answering the rest of the description, and this was held to pass. The number of the lot was held superfluous, the description being sufficient without it.

19. In *Riggs v. Myers*, 20 Mo. 239, the testator described lands as in a township where he really owned none, but the identification was completed by a reference to the "big spring" on them. So it seems that the fact that the actual location of the land devised is sufficiently identified by reference to natural objects upon it, is not different in principle from its identification by the remaining portion of the description.

20. In *Button v. Tract Society*, 23 Vt. 336, the devise to the "American Home Mission Tract Society" was held to operate in favor of the American Tract Society, there being no such devisee as the one described. It was shown that the testator had been accustomed to contribute to that Tract Society, and also to the American Home Missionary Society, from which it might well be suspected that he intended *both*, and that the word *and* had been omitted; but as he also constituted "the above-named Tract Society" a reversionary legatee, it was inferred that he intended the devise only for that society.

21. In *re Gregory*, 34 Beav. 600, the bequest was "unto Francis Gregory, the youngest son of my brother Francis Gregory." Now his brother Francis Gregory had three sons, the eldest, Arthur Francis, the youngest, Arthur Charles. On evidence, the master of the rolls made the description prevail over the name. The case is quite analogous to *Chevalier v. Huthwaite*. In *Vernor v. Henry*, 3 Watts, 385, the testator had given a legacy to James Vernor Henry, describing him as his nephew, and son of Elizabeth, a deceased sister of the testator. James Vernor Henry claimed the legacy, as also did Robert R. Henry. It appeared in evidence that James was not the nephew, but a grand-nephew, of the testator, and instead of being the son, he was the grandson, of Elizabeth. Robert, on the other hand, was a nephew of the testator, and the only son of Elizabeth living at the date of the will. Upon the extrinsic evidence produced, James was held entitled.

22. In *Jackson v. Wilkinson*, 17 Johns. 146, an action of ejectment, Robert Morris was the common source of title. He deeded to the plaintiff's lessor, C., a tract of land in Ontario county, "to be admeasured according to the following bounds and lines, to wit: Beginning at a southwest corner of a certain tract of land of 100,000 acres, granted to C. W. and G.; thence extending east, along the southern boundary of the said tract, six miles; thence southerly so far as, by lines drawn from those two points parallel

to the eastern and western boundaries of said 100,000-acre tract, will include the quantity of 33,750 acres of land." He had previously deeded to L., L. and B. a tract, the eastern boundary of which ran over and cut off two miles in width of the western part of the tract first mentioned, thus producing a deficiency of 11,694 acres. *Held*, that the line could not be extended so far south, upon other land granted by Morris to C., so as to give the quantity of acres intended, although the latter deed described the land conveyed as beginning at the southwest corner of a certain tract of land of 33,750 acres, granted or to be granted by Morris to C. The court say: "We cannot accede to this proposition, where there is a known and well-ascertained place of beginning. In such a case the grant must be confined to the lands corresponding with the boundaries given in the deed. It would seem to be equitable, if Morris continued to own the adjoining land, that the grant should be satisfied by being extended on his other lands, so that the grantee might have his complement; but even then we much doubt whether a court of law could afford the relief, etc."

23. In *Mann v. Mann*, 1 Johns. Ch. 232, a testator bequeathed to his wife "all the rest, residue and remainder of the moneys belonging to his estate at the time of his decease." Witnesses were examined to show the testator's intention that this bequest should embrace bonds, mortgages, promissory notes, etc. *Held* inadmissible, there being nothing in the will to indicate that he intended to use the word in that extended sense, and "the bequest having a certain and definite subject on which it can operate." The chancellor lays great stress on this latter circumstance, and quotes *Doe v. Oxenden*, 3 Taunt. 147, of which he says: "The court considered this fact as a very material circumstance, and one which made the case to differ from all others on the subject of explaining a will by parol proof; because in all cases that had been before, the evidence was admitted to explain a part which, without such explanation, could have had no operation."

24. In *Woods v. Moore*, 4 Sandf. 579, the testatrix devised two lots of land, describing them, which lots she had previously sold and conveyed, taking bonds and mortgages for the unpaid purchase-money, which she held at her death. *Held*, that the bonds and mortgages passed to the devisee. Ch. J. Oakley says: "The rule established is very plain, that where it is clear that there was an intent that the property in question should pass, it will be held to pass, notwithstanding a misdescription, so long as

there is enough of correspondence to afford the means of identifying the subject of the gift."

25. In *Masters v. Masters*, 1 P. Wms. 421, the testatrix left a legacy to "Mrs. Sawyer," "when there was no such person ever known to her, but it was alleged that she meant one Mrs. Swopper." It was left to the master to "find if she was the person intended." This case is disapproved by Judge Redfield, but the report does not show the context of the will.

26. In *Bradwin v. Harpur*, Amb. 374, there was a legacy to the children of Mary and of Anne. Mary had no children and Anne died before the will was made. The court transposed the names upon this proof. This case is doubted by Judge Redfield.

27. In *Thomas v. Stevens*, 4 Johns. Ch. 607, on defendant's admission that the name Cornelia was intended for Caroline, Chancellor Kent, "being perfectly satisfied of the intention of the will, and of the misnomer, on the authority of the cases of *Beaumont v. Fell*, 2 P. Wms. 141, and *Bradwin v. Harpur*, Amb. 374, decreed" in conformity with the admissions. So in *Powell v. Biddle*, 2 Dall. 70; S. C. 1 Am. Dec. 263, parol evidence was admitted to show that a legacy to Samuel P. was intended for William P., though there were persons of both names; the testator having always called William "Samuel."

28. In *Lee v. Pain*, 4 Hare, 251, there was a legacy to "Mrs. and Miss Bowden." There were no such persons, but there was a Mrs. Washburne, whose maiden name was Bowden, and she had a daughter, and the testator used to call them Bowden. Evidence of this was admitted. The same doctrine in *Clayton v. Lord Nugent*, 13 M. & W. 205-6.

29. In *Anstee v. Nelms*, 1 H. & N. 225, the devise was of all the testator's lands in Doynton. The testator owned a farm all in that parish, except one piece of land, which was in another parish. Evidence was held properly admitted to show that the farm had been generally reputed to be, and up to 1823, rated in Doynton, and that piece passed with the rest of the farm.

30. So parol evidence was admitted in *McCorry v. King's Heirs*, 3 Humph. 267; S. C. 39 Am. Dec. 165, to show what was intended by a "tract of land bought of Charles and James McCartney, lying in Green county."

31. In *Goods of Ashton*, 1892, P. 83, the testator by his will, appointed four executors, one of whom was described as "my nephew G. A." It appeared that there were two persons named

‘G. A.’—one an illegitimate son of the testator’s sister, the other, the legitimate son of the testator’s brother. The testator also nominated as another of his executors “my nephew E. A.,” and it appeared that E. A. was his illegitimate grand-nephew, the son of his illegitimate nephew. He further described as “my niece” a person who was his illegitimate niece. *Held*, that the language of the will showed that the testator applied the description of nephew and niece to legitimate and illegitimate relatives indiscriminately; and that the court was therefore entitled to admit extrinsic evidence for the purpose of showing that the illegitimate and not the legitimate nephew was intended by the will. The court said: “Two points are to be kept quite separate. The first point is whether in the word ‘nephew’ *per se* there is a latent ambiguity which will entitle us to inquire whether by the word the testator meant his legitimate or illegitimate nephew. If the matter turned upon that point alone, although I have an opinion I should have expressed it with much hesitation, because it appears to me there is considerable conflict of authority. The question is, can one say that the word ‘nephew’—though in its primary sense applicable to a legitimate nephew only—may be properly applied, in its ordinary and proper sense, to illegitimate as well as legitimate relatives? If it can, then there is a latent ambiguity, and parol evidence may be introduced. There is a conflict of authority as to how the word ‘nephew’ may be read. There is the case of *Grant v. Grant*, L. R. 2 P. & D. 8; L. R. 5 C. P. 380, 727, which was heard three times. Lord Penzance, the Court of Common Pleas and the Court of Exchequer Chamber, all held that the word, although in its primary sense importing consanguinity, might in the secondary sense mean affinity, and that parol evidence could be adduced to show which was intended. If that be so, and if ‘nephew’ can be used in so general a sense as to include both consanguinity and affinity, it might fairly be said to include both legitimate and illegitimate nephews and nieces. But the difficulty is that *Grant v. Grant*, *supra*, does not appear to have been unchallenged. It must be admitted that the late master of the rolls, in *Wells v. Wells*, L. R. 18 Eq. 504, disapproved of the decision in *Grant v. Grant*, *supra*. But speaking with the profoundest deference of the decision of so great a judge, it may be doubted whether the two decisions of the Court of Appeals which he preferred to *Grant v. Grant*, *supra*, namely: *In re Blower’s Trusts*, L. R. 6 Ch. 351, and *Sherratt v. Mountford*,

L. R. 8 Ch. 928, are really opposed to that case. Indeed in the latter case, James, L. J., appears to refer to *Grant v. Grant*, *supra*, with approval. It must be admitted also that Malins, V. C., in *Merrill v. Morton*, 17 Ch. Div. 382, seems to have preferred to follow Sir G. Jessel, rather than *Grant v. Grant*, *supra*. I do not think that is weakened by the observation that Malins, V. C., admitted the principle of interpretation of *Grant v. Grant*, *supra*, in *In re Wolverton Mortgaged Estates*, 7 Ch. Div. 197, because all he held there, I think, was that the words 'Thomas' and 'Tom' being synonymous, there was a latent ambiguity which was to be explained. You have therefore the authority of Sir G. Jessel and Malins, V. C., one way, and *Grant v. Grant*, *supra*, and I think *Sherratt v. Mountford*, *supra*, the other. Under these circumstances, if I had had to decide the question on that point, I should have followed *Grant v. Grant*, *supra*, partly because of the great number of judges who concurred in it, and partly because the decision commends itself to my own mind. But I do not wish to put my decision on that point. There is another point which seems to me stronger. In this will the testator, to use the language of Lord Cairns in *Hill v. Crook*, L. R. 6 H. L. 265, 285, has made us a dictionary. If he had done it in terms there would have been nothing more to be said, but he seems to me to have done it practically, because he has used the word 'nephew' where it clearly meant an illegitimate grand-nephew, and he has also described as his 'niece' a person who was his illegitimate niece. He has made his dictionary for us in an unambiguous way," etc.

32. In *Morrell v. Morrell*, 7 P. Div. 68, the testator, in his instructions, directed that all his B. shares should be given to his nephews, but the word "forty" was inserted in the will before "shares." The shares were four hundred in number. Evidence that the instructions had been read to the testator, but that the will was not, and that before the execution of the will he had declared to his wife his intention to leave the whole number of shares to his nephews. The president, Sir James Hannen, left it to the jury to say whether the word "forty" had been inserted by mistake, and they found it had, and the court ordered it struck out. He distinguishes between striking out and supplying, holding that the latter may not be done; and he held that if the testator had seen the word and adopted it, it could not be rejected, on the authority of *Harter v. Harter*, 3 P. & D. 11; but that, as the House of Lords,



in *Fulton v. Andrew*, L. R. 7 Eng. & Ir. App. 448, has struck out an entire residuary clause, on the ground that the testator did not know it was in the will, the same principle may be applied to a single word. In the last case cited, Lord Chancellor Cairns declared that there is no unyielding rule of law, especially where fraud enters into the case (as was the fact in the case at bar) that where the will had been read over to the testator, and he was of competent mind, all further inquiry is shut out on the ground that he is conclusively presumed to know the contents. "A very questionable precedent," says Judge Redfield.

33. In *Rhodes v. Rhodes*, L. R. 7 App. Cas. 192, there was an effort to strike out the words "from and after the decease of my said wife." The draftsman testified that he inserted those words without instruction, and of his own volition, and that the whole will was read to the testator and so executed. The House of Lords refused to strike out those words, although their effect was probably not appreciated by the testator.

34. In *Moreland v. Brady*, 8 Oreg. 303; S. C. 34 Am. Rep. 581, a testator devised lands in Portland as follows: To Margaret, lot 2 in block 187, and to Esther, lot 1 in block 187. He had no such lots. *Held*, that oral evidence was admissible to show that he did own lots 3 and 4 in that block, and that those lots would pass by the will." The court said there could "be no question of the admissibility of extraneous oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was in at the time he made the will," and that "this is the very kind of case to which the maxim *falsa demonstratio non nocet*, applies." Also: "The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them. The testator could not have intended to devise lots to which he never had any title, but must have intended to devise those which did belong to him."

35. In *Merrick v. Merrick*, 37 Ohio St. 126; S. C. 41 Am. Rep. 493, the testator owned only 160 acres of land, one-half in section 27, the other being the east half of the northeast quarter of section 28. He devised the former half by a correct description, but in devising the other the word "south" was used by mistake for "north." *Held*, that the erroneous part should be rejected, and the devise would take effect. The facts of the real ownership and

the mistake seem to have been ascertained by parol evidence, but the point is not discussed.

36. In *Chambers v. Watson*, 60 Iowa, 339; S. C. 46 Am. Rep. 70, it was held that a devise of "sixty acres se. 25 toon 7, and forty acres, se. 24, toon 6, jasper county," refers to sections and towns, and parol evidence is competent to show the township and range of the lands, and that the testator had no other lands in Jasper county, "for the purpose of applying the devise to its subject matter."

37. In *Decker v. Decker*, 121 Ill. 341, a testator in his will devised "twenty acres off the west half of the northeast quarter of the northeast quarter of section 33," township 18 north, range 11 west, of the third principal meridian, and it appeared that he had no title to such land, but that in fact the only land owned by him in that section was the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , and that this land was not specifically devised; *held*, that there was a latent ambiguity, which might be removed by evidence extrinsic to the will, and that the words "northeast quarter," where they occur for the first time, might be stricken out, and then enough remained to identify the N. W.  $\frac{1}{4}$  as the property intended. The court said: "There is said to exist a latent ambiguity, arising under the evidence *dehors* the will; and that the provisions of the will, read in the light of this extrinsic evidence, sufficiently make it appear that the devise to plaintiff in error, under this first clause of the will, was of a part of this N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of said section 33. While the general rule undoubtedly is that the intention of the testator is to be gathered from an inspection and consideration of the will, and from no other source, in case of latent ambiguity, courts do and must listen to extrinsic evidence, not for the purpose of contradicting or adding to the terms of the will, nor to wrest the words of the testator from their natural operation, but for the purpose of determining the existence or non-existence of latent ambiguity; for the latent ambiguity can only be shown by extrinsic evidence, and for the further purpose of enabling the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, whereby to determine the intention of the testator. *Gilmer v. Stone*, 7 Sup. Ct. Rep. 689 (March 8, 1887, opinion by Harlan, J.) 'The law is not so unreasonable,' says Mr. Wigram, 'as to deny to the reader of an instrument the same light which the writer enjoyed.' Wigram Wills (2d Amer. ed.) 161; see also

*Perry v. Hunter*, 2 R. I. 80; *Brearley v. Brearley*, 9 N. J. Eq. 21. It is further to be observed, that as a latent ambiguity is only disclosed by extrinsic evidence, it follows that if removable at all, it may be removed by extrinsic evidence. *Patch v. White*, 117 U. S. 210. Mr. Redfield, in his work on Wills (vol. 1, p. 584), lays down the rule that where the description of the object or subject of a devise is erroneous and mistaken, extrinsic evidence is admitted to aid the construction, by showing to whom or to what the testator must have referred. Latent ambiguities, as found by Chief Justice Tindal in *Miller v. Travers*, 8 Bing. 244, and which might be explained by parol, fall into two classes: (1) Where the description of the devisee, or subject-matter of devise, is clear on the face of the will, but on inquiry it is found that the words describe two or more persons or things, with equal accuracy; so unless it can be shown, by extrinsic evidence, to which testator intended his words to apply, the devise must fail for uncertainty; and (2) where the description of the devise, or of the devisee, is correct in part, and in part incorrect, as where devisee's name is correctly given, but his residence, or some other circumstance descriptive of the person or thing, is incorrect. And the modern state of the law upon this subject is well illustrated in the recent opinion of the Supreme Court of the United States, wherein Mr. Justice Bradley, speaking for the court, said: 'It is settled doctrine that \* \* \* such an ambiguity may arise upon a will, either when it names a person as the object of the gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances or declarations of the testator. 1 Jarm. Wills, 370; Hawk. Wills, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or if it is an obvious mistake, will read it as if corrected.' *Patch v. White*, 117 U. S. 210. Tested by these principles, it is very clear that in the devise under consideration there is a latent ambiguity. On the face of the will, the subject-matter

of the devise is clear; but on inquiry it is found that the descriptive words of the devise are, in part, false, the parcel of land appearing to be devised did not belong to the testator. If then we may strike out of the description of the premises appearing to be devised, so much as is false, and enough remain in the will interpreted in the light of surrounding circumstances at the time the will was made, to identify the premises devised, this case will fall within the class of cases of which *Patch v. White*, *supra*; *Allen v. Lyons*, 2 Wash. C. C. 475; *Winkley v. Kaime*, 32 N. H. 268; *Riggs v. Myers*, 20 Mo. 239; *Orphan Asylum v. Emmons*, 3 Bradf. 144; *Townsend v. Downer*, 23 Vt. 225; *Doe v. Roe*, 1 Wend. 541; *Mann v. Mann*, 1 Johns. Ch. 234; *Woods v. Moore*, 4 Sandf. 579, and *Emmert v. Hays*, 89 Ill. 12, are examples as to the subject devised; and *Gilmer v. Stone*, *supra*; *Vernor v. Henry*, 3 Watts, 385; *In re Gregory*, 34 Beav. 600; *Button v. Tract Soc.* 23 Vt. 336, are examples as to the object of devise.

"We have seen that in case of latent ambiguity, as in the present case, where it is shown that the description of the subject of the devise, as it appears on the face of the will, is false in part, courts may look beyond the words of the will, may place themselves in the position occupied by the testator when he executed the will, and view the testator's affairs as he viewed them, the better to determine the intention of the testator from the language of the will, after excluding what is shown to be false. This is all it is contended the court should do in this case; and to this extent, under the authorities, we may most certainly go. If then it shall appear, after rejecting the false words of description, that sufficient remains to identify the lands intended to be devised, effect must be given to the devise accordingly. It seems clear to us, from the will itself, that the testator intended to devise all his estate. Not only so, but it was his intention to devise 'my real estate,' not real estate which he did not own. It seems very clear to us also that he intended his son, plaintiff in error, should be a prominent sharer in his bounty. It seems to us certain that testator intended to devise lands owned by him in town 18, north of range 11 west, of the third principal meridian; also lands lying in section 33, in the same town, and owned by him; also lands lying in the N. E.  $\frac{1}{4}$  of said section, and owned by him; and also twenty acres off the west half of his land, said quarter section. The testator in fact possessed just such lands; and we cannot doubt, in the light of these facts, that the parcel of land in the

mind of the testator when he made his will was the twenty acres off the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 33, town 18, 11, because this tract of forty acres was the only tract owned by him lying in the N. E.  $\frac{1}{4}$  of said section, or indeed anywhere in the section. This conclusion is reached, not by adding to the terms of the will, nor by inserting what was by mistake left out of the will, and thereby reforming it, but by rejecting or refusing to give effect to the words 'of the northeast quarter,' where they occur for the first time in the description. And this rejection is made because it is conclusively shown that to this extent the description of the devise is false in fact. The township and range are certain; the section therein is certain; the quarter section within the section is certain; the only land possessed by the testator within the quarter section is certain; and the part off the west side of the testator's lands in the quarter section is also certain. Under such circumstances, there cannot be said to be any uncertainty as to the premises intended by the testator to be devised to his son. It was twenty acres off the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 33. In thus giving effect to the devise, the false part of the description is rejected, and effect given to that part which is true; and this is done without in the slightest degree violating any positive rule of law, or accepted canon of construction. But it is insisted that the principle of *Kurtz v. Hibner*, 55 Ill. 514, is at variance with the views here expressed. An examination of the facts of that case will, we think, conclusively show that it is clearly distinguishable from the case now under consideration. In that case the frame of the bill and the offered evidence all preceded upon the theory that a court of chancery might reform the will by correcting a mistake in description. The offer was to prove 'that a mistake was made in drafting the will by the insertion of the words "section thirty-two," instead of "section thirty-three;"' that devisee 'had been in the actual possession of the tract for a number of years; and upon the repeated promise of the testator in his life-time that he would give the same to' devisee, she had made lasting and valuable improvements. And as to the other tract, the offer was to prove that devisee, at the death of the testator, 'was in the actual possession of the forty-acre tract, as the tenant of the deceased, and that the draughtsman of the will, by mistake, inserted the word 'one' after the words 'section thirty,' instead of 'two,' so as to bequeath to James land in section 31, instead of section 32.

There was no pretense in that case that by rejecting so much of the description as was false, enough of the description remained so as that the lands devised could be identified. The moment that the numbers of the sections were rejected, the devise failed for uncertainty. The only means of identification furnished by the description of the will lay in the numbers of the sections, as was said in *Bowen v. Allen*, 113 Ill. 53. When they were rejected nothing was left by which the lands intended to be devised could be located within any one 36 sections in the township, unless new numbers of sections could be inserted in the description. To have done that would have been to add to the will, to substitute words not used by the testator in place of those used by him, in effect, to make a will for the testator. Wills are required by statute to be in writing, and courts are without the power of substituting, for the written words of the testator, other and different words not used by him. Then to permit the substituting of words not used in place of words used, would not only render this provision of law inoperative, but it would overthrow the statute of frauds, and again open the door to all the evils that that law was intended to prevent. Every consideration impels us to deny the power of courts to add to or reform a will on the ground of mistake. The *Kurtz* case goes upon this principle, and finds support in the following American cases: *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Hill v. Felton*, 47 Ga. 455; *Sherwood v. Sherwood*, 45 Wis. 357." The *Kurtz* case will be reviewed below.

38. In *Morgan v. Burrows*, 45 Wis. 211; S. C. 30 Am. Rep. 717, the will described one boundary of a tract of land devised, in terms in fact applicable to two different lines. *Held*, that parol evidence of the testator's intent, in including his declarations at the time of execution, was admissible to identify the boundary.

39. In *Hawkins v. Garland's Adm'r*, 76 Va. 149; S. C. 44 Am. Rep. 158, the testator made a bequest to his namesake "S. G., son of Captain J. F. S." *Held*, that evidence was admissible that there was no person answering the description, and that the testator intended S. G., son of Captain J. F. H. The court said: "I can find no case, English or American, after a careful examination of the authorities, where after a latent ambiguity has been certainly established, evidence was rejected which tended to show the real intention of the testator, and which was necessary to carry that intention into effect."

40. In *Merrick v. Merrick*, 37 Ohio St. 126; S. C. 41 Am. Rep. 493, the testator owned only 160 acres of land, one-half in section 27, the other being the east half of the northeast quarter of section 28. He devised the former half by a correct description, but in devising the other the word "south" was used by mistake for "north." These facts being ascertained by parol evidence, it was *held*, that the erroneous part should be rejected, and the devise would take effect.

41. In *Patch v. White*, 1 Mackey, 468, District of Columbia, the devise was of "lot 6, in square 403 together with the improvements thereon." That was the entire description. "The balance of my real estate" he devised to another. The testator did not own that lot, but he owned lot 3, in the square 406. *Held*, that parol evidence of that fact was inadmissible to effect the substitution in an ejectment suit. The court said; "The answer therefore to the question above proposed—enjoined as well as sanctioned by the general principle above mentioned—must be, that any evidence is admissible, which, in its nature and effect, merely explained what the testator has written; but no evidence can be admissible, which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written. \* \* \* Now applying these principles here, what can we do with the devise of this lot? The will says, 'lot 6, in square 403,' and it is said that ought to be read lot 3, in square 406. The first thing to do then is to strike out the number of the lot, and then to strike out the number of the square. What then remains? Nothing on earth but these 'improvements.'" The chief justice dissented.

But this holding was reversed by the Supreme Court of the United States, 117 U. S. 210. The court recognized the office of extrinsic evidence to explain latent ambiguities, and the maxim, *falsa*, etc., and applying that maxim, *held*, that the testator intended to dispose of all his real estate, and supposed he had done so; that evidence might properly be received to show that he did not and never did own lot No. 6 in square 403, which had no improvements on it, but did own lot No. 3 in square 406, which had a house on it, occupied by his tenants; that this raised a latent ambiguity, and that the evidence, taken with the context of the will, showed that the lot really devised was No. 3 in square 406. Some stress is laid by Bradley, J., on the opening language of the will, in which the testator speaks of the "worldly

estate wherewith it has pleased Almighty God to bless *me*," and disposes "of *the same* in the *following manner*"; but it is also said that "on general principles he would not have given him a lot which he did not own." He cites with approval the criticisms of Judge Redfield on *Kurtz v. Hibner* (*infra*), approves *Asylum v. Emmons*, 3 Bradf. 144, and allows force to the word "improvements," which the court below despised. He said, the lot is identified by its ownership, by its having improvements on it, by its being in a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. Woods, J., wrote a dissenting opinion, Matthews, Gray and Blatchford, J. J., concurring, on the ground that it was not a case of latent ambiguity but only of mistake. He cites *Tucker v. Seaman's Aid Society*, 7 Metc. 188, the *Kurtz* and *Fitzpatrick* cases (*infra*), and the cases in the foot-note, which have not been hereinbefore referred to, but which were cases of pure mistake.<sup>1</sup>

42. In *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradford, 144, the testatrix bequeathed "my shares of Mechanics' Bank stock in the City of N. Y." She had no bank stock except ten shares of the City Bank. The word "Mechanics'" was rejected, and the bequest was held to carry the City Bank stock, because it was evident that the testatrix meant to bequeath her bank stock. This was founded on *Day v. Trig*, 1 P. Wms. 286, where a devise of all the testator's "freehold houses in Aldersgate Street," was held to carry his leasehold houses, which were the only houses he had there; and on *Door v. Geary*, 1 Ves. Sr. 255, where a legacy of "£700 East India stock," the testator having none, was held to carry £700 bank stock, Lord Hardwicke rejecting the words "East India."

A will which devises land described as the north half of the donation claim of Bartholomew Dove, may be admitted in evidence, to be followed by extrinsic evidence tending to show that the north half of the donation claim of Bethuel Dove was intended to be devised. *Jones v. Dove*, 7 Oreg. 467.

43. In *Cleverly v. Cleverly*, 124 Mass. 314, the testator devised to his brother "the dwelling-house and stable which my said brother now occupies, and the lot of land on which said

<sup>1</sup> *Clementson v. Gandy*, 1 Keen, 309.  
*Chambers v. Minchin*, 4 Ves. Jr. 675.  
*Smith v. Maitland*, 1 Ves. Jr. 362.

*Newburgh v. Newburgh*, 5 Madd. 364.  
*Cesar v. Chew*, 7 G. & J. 127.  
*Box v. Barrett*, L. R. 3 Eq. 244.



house and stable stand." In a writ of entry brought by the brother against the residuary devisee, it appeared that the demanded premises, upon which stood a building used for a market, consisted of a portion of a tract of land, upon the rest of which stood the dwelling-house and stable mentioned in the will; that there was a passage-way between the market and dwelling-house, used in common by the occupants of each; that the dwelling-house, stable and land, with the exception of a strip about the market, had been in the exclusive occupation of the demandant without payment of rent since 1853; and that for nearly the same time the market had been in the occupation of lessees of the testator and tenant. The judge admitted the testimony of the scrivener of the will, who testified that the testator, at the time of drawing the will, described the land occupied by the dwelling-house and market as separate pieces of property; and also admitted in evidence conveyances by the testator of the entire tract, describing it as land with a "dwelling-house and shop thereon," the term "shop" referring to the "market;" and found for the tenant. *Held*, that the only land which had been used as parcel of the estate occupied as a dwelling-house and stable, passed by the will to the demandant, and that the evidence was properly admitted to identify the subject-matter of the devise. The court said: "It is always competent to identify by parol the subject-matter of a grant. It is not important to inquire whether the parol evidence is competent for the purpose of raising a latent ambiguity, to wit, what constituted the dwelling-house and stable and the lot of land on which they stood, and then to explain the ambiguity, or whether it is evidence offered for the purpose of identifying the subject-matter of the grant, or for the purpose of applying the description in the grant to the surface of the earth. The result is the same, upon whichever ground it is based. If the devise had been simply of my Black Acre, parol evidence would be competent to show what tract of land constituted Black Acre. The evidence is not offered for the purpose of altering, varying, enlarging or diminishing the force of the language used in the devise. It is offered merely for the purpose of identifying the subject-matter of the devise, and for this purpose the acts and declarations, and conveyances, by description, of the testator, are admissible. They do not tend to show that the words used in the will have any other than their ordinary and natural signification, and are not therefore subject to

the objection that they tend to add to, to take from, or to change their meaning."

44. In *Peters v. Porter*, 60 How. Pr. 422, it was held proper to resort to extrinsic proof to explain a latent ambiguity as to the subject of the devise, and to make clear the intention of the testatrix. The testatrix devised two lots and a gore "on the south-erly side of Forty-ninth street, near Eighth avenue." It appeared that the testatrix owned no property on Forty-ninth street, but did own property on One Hundred and Forty-ninth street answering fully, in other respects, the terms of the devise. It also appeared that persons living above One Hundredth street drop the One Hundred and designate the lot by the remaining figures. *Held*, that the devise took the two lots in question.

45. In *Allen v. Bowen*, 105 Ill. 361, it was held that a description of property devised as "my house and lot in the town of Patoka, Illinois," is sufficient to pass the property. It is capable of exact identification and location, from being named as the testator's house and lot in that town; and with proof that the testator owned a house and lot in such town, which lot is the north two-thirds of lot twelve, in block ten, railroad addition to the town of Patoka, Illinois, and never owned any other house and lot in that town, the description is rendered certain, and such description will not be vitiated by an attempt in the will to give a further description in which the lot is misdescribed as lot nineteen instead of lot twelve. The misdescription, in such case, may be disregarded under the maxim, "*falsa demonstratio non nocet*."

46. In *Pickering v. Pickering*, 50 N. H. 349, the court said: "The devise to the plaintiff appears to be of five acres of land in the north-west corner of the testator's farther field, to be laid out as nearly square as may be convenient, and opposite to five acres on the west side of the road, devised to Susan Pickering. If there is any ambiguity here it is not latent, but is apparent on the face of the devise; and parol evidence of the intention of the testator is not admissible. "When there is difficulty in applying the words of a will to the person or subject, and that difficulty does not arise upon the face of the will itself but is caused by the introduction of extrinsic evidence, then resort may be had to further extrinsic evidence to remove the difficulty, by showing what person or subject was really intended. As if it appear by evidence *dehors* the will that there are two or more persons or subjects that would come within the words of the will, parol evidence may be

received to show which was intended. But if the ambiguity is apparent on the face of the will, the court must give it a construction, if it can be done. If it cannot be interpreted, then the devise must in general fail, and cannot be aided by extrinsic evidence."

47. A testator requested his executors "to sell and dispose of the following described land," but left out the description. *Held*, that evidence that he owned a parcel of land not specifically disposed of was not admissible for the purpose of supplying the missing description. Parol evidence cannot be resorted to for the purpose of supplying a description of land omitted from a devise. A devise from which the subject-matter has been omitted is not open to construction.<sup>1</sup> The court said: "It is certain that it was not competent to resort to parol evidence to supply the absent matter. The case was not one for interpretation or construction, because there was nothing on which the power could be exercised, and as there was no subject-matter to be construed or interpreted, there was no call for extrinsic facts to aid the office of interpretation or construction. The provision is a complete blank and in regard to the property the will is dumb. There is nothing whatever on the face of the instrument to denote what real estate the testator had in view, nor anything to incline the intention one way rather than another in search of it."

48. In *Hardy v. Warren*, 17 Am. Rep. 176, the testatrix died leaving a legal husband, but from whom she had obtained a void divorce; since which divorce she had been living with another man, P., who she claimed was her lawful husband. In her will she made a bequest to her "husband." *Held*, that evidence was admissible to show that she intended her husband *de facto* as the beneficiary, and not her lawful husband. The court said: "The evidence from the will itself, as well as the extraneous evidence, shows clearly that the testatrix did not intend to designate the petitioner as her husband when she used that word in her will. The objection made by the petitioner is not to the weight but to the competency of the evidence. It is contended that there is a conclusive presumption, which no evidence is competent to rebut, that by the word 'husband' in her will the testatrix meant her lawful husband. We think that it is a question of the intention of the testatrix to be determined by evidence competent to show intention. The word is used to designate a particular person.

<sup>1</sup> *Crooks v. Whitford*, 47 Mich. 283.

The fact that a person is the lawful husband is strong, and of itself plenary, proof that he was the person intended; but it is not conclusive, and may be controlled by stronger evidence, from the will or from circumstances, that he was not the person intended."

49. In *Gallup v. Wright*, 61 How. Pr. 286, the testatrix, who left a niece, Fanny R. Gibson, and a grand niece, Fanny Gibson, mother and daughter, gave \$1,000 unto my grand niece Fanny R. Gibson. *Held*, that this constituted a case of latent ambiguity or equivocation, as to which extrinsic evidence was admissible to prove which of the persons were intended by the testatrix; and as the mother was the nearest of kin to the testatrix, a presumption arises that she was the person intended.

50. In *Charter v. Charter*, L. R. 2 Pr. & Div. 315; 1 Eng. Rep. 249, the testator appointed as his executor his son Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter. The court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him. It would seem that in such a case the court may receive parol evidence of the intention of the testator. Affirmed on appeal (L. R. 7 H. L. 364; 12 Eng. Rep. 1), by an equal division of the court.

51. In *Matter of Kilvert's Trusts*, L. R. 7 Ch. App. 170; 1 Eng. Rep. 499, the testatrix, by will made in 1868, gave a legacy to the "treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of Worcester, to be applied by him for the benefit of that charity." Two societies made a claim. One had been founded in 1777 for the benefit of the widows and orphans of the clergy of the diocese, at which time the diocese comprised only the arch-deaconry of Worcester. In 1837 the arch-deaconry of Coventry was added to the diocese, and in 1848 the Worcester society altered its title, so as to show that its operations were restricted to the arch-deaconry of Worcester. The other society had been founded in 1777, for the relief of widows and orphans of clergy in the arch-deaconry of Coventry. The father of the testatrix had been a subscriber to the Worcester society till his death in 1817. His widow had continued her subscription till her death in 1860; and the testatrix had continued it from that time at an increased rate; but it

did not appear that the testatrix, or any of her family, had subscribed to the Coventry society. *Held*, by Malins, V. C., that the gift was to be treated as a gift to an object, not to a particular society, and must be apportioned between the two societies. *Held*, on appeal, that the gift was a gift to a particular society, with a slight inaccuracy of description, and that the Worcester society was solely entitled.

52. In *Trustees v. Colgrove*, 4 Hun, 362, the defendant's testator by his will authorized his executors "to pay over to the officers of the Protestant Episcopal Church into the fund to support the Episcopacy of said church," certain moneys therein specified. The plaintiffs were at that time, and still are, trustees for the management and care of a fund for the support of the diocese of Central New York, having been incorporated for that purpose under chapter 429, of 1868; at the time of making his will the testator knew of the existence of said corporation, and of the fact that exertions were being made to increase the said fund. *Held*, that the plaintiffs were entitled to the bequest. It appeared upon the trial that there were four other dioceses in the State of New York, besides the diocese of Central New York, respectively having trustees, and a fund held by them for the support of the Episcopate, to either of which the terms of the bequest were applicable. *Held*, that this was a case of latent ambiguity, and that parol evidence and statements of the testator were admissible to show that he intended to bequeath the money to the plaintiffs. The court said, page 368: "The current of opinion of the courts in this country is tending very clearly to greater liberality in receiving extrinsic evidence to aid in giving a construction and effect to wills and show what property was intended to be devised, and what person was intended to take as indicated by the following cases: *Howard v. American*, etc., 49 Me. 288; *Winkley v. Kaime*, 32 N. H. 268; *Domestic Appeal*, 30 Penn. St. 425; *Button v. American*, 23 Vt. 336; *DuBois v. Ray*, 35 N. Y. 162; *Pond v. Bergh*, 10 Paige, 152. Within the principle asserted in these and other cases, the extrinsic evidence taken at the trial was properly received in aid of the construction of this will."

53. In *Warner v. Miltenberger*, 21 Md. 264; S. C. 83 Am. Dec. 573, extrinsic evidence was admitted to show the sense in which the testator employed the word "lot" that he did not mean an ordinary town lot, but a large parcel of ground. This was a case of an ambiguity, and is distinguishable from such cases as

Yundt's Appeal, 13 Pa. St. 575 ; S. C. 53 Am. Dec. 496, excluding parol evidence to show the meaning attached by the testator by the word "advancements," and *McAllister v. Tate*, 11 Rich. L. 509; S. C. 73 Am. Dec. 119, holding the same as to the words "fee, simple," and that they could not be shown to mean a fee for life.

54. In *Denfeld v. Smith*, — Mass. —; 30 N. E. Rep. 1018, the court said: "The first question is as to the meaning of the devise in article 4, which is as follows: 'To my sister, Eliza A. Leonard, a home at my house as long as she lives; and I direct that my executors attend to this.' The testimony which was offered on the one side and the other of declarations of the testator, as to his wishes and intentions, was rightly excluded. His intention must be gathered from the will itself, viewed in the light of the existing circumstances. This is now conceded. The word 'home,' when made the subject of a devise, is ambiguous and may mean merely the use of sufficient room, or it may include a support. We have therefore to put ourselves, as far as possible, in the testator's place, to ascertain the meaning which it bore in his mind."

55. In *Grubb v. Foust*, 99 N. C. 286, the devise was of "all my interest in 1029 acres of land," and there being no evidence that the testator owned any other land, evidence was admitted to identify it.

56. A testator having devised to one of his sons the south side of his homestead by a line of division, "thence supposed nearly an east course to a post, the corner," etc., and two post corners having existed, parol evidence was admitted to define which he intended. The court said it was not a question of latent ambiguity, "but merely the application of a description to its subject, and this always requires parol evidence, or its equivalent, a view. \* \* \* The truth can be ascertained only by learning all the facts and landmarks which can fairly be supposed to have been known to the testator, and to have influenced his mode of expressing his will. In other words, the jury are to have such information as will place their minds as nearly as possible within the relevant circumstances which surrounded the testator when he indited the expression which needs interpretation."

57. In *Reynolds v. Robinson*, 82 N. Y. 103; S. C. 37 Am. Rep. 555, the testator was indebted to his adopted daughter in an unliquidated amount for services. By his will he provided

legacies for her and her daughter, "after payment of debts," to a less amount than the value of the services. *Held*, that evidence was inadmissible to show his declarations that the legacies were intended as compensation for the services. The court said: "The general rule is that declarations of a testator before, contemporaneously with, or after the making of a will, are inadmissible to effect its construction, except in two cases, viz.: where there is a latent ambiguity, arising *dehors* the will as to the person or subject meant to be described, or to rebut a resulting trust."

58. In *Hill v. Felton*, 47 Ga. 455; S. C. 15 Am. Rep. 643, it was held that when the court is of opinion that there is no patent ambiguity in those parts of a will affecting the property in issue before it, and no latent ambiguity is raised by proof of extrinsic circumstances, the instructions of the testator to the scrivener who drew the will are inadmissible to show that the testator intended to dispose of his property in a manner different from the direction it would take when the ordinary rules of construction are applied to the words of the will.

59. In *Dunham v. Averill*, 45 Conn. 61; S. C. 29 Am. Rep. 642, the testator provided a bequest for "The American and Foreign Missionary Society." Parol evidence was admitted that there was no society of that name, but that "The American Board of Commissioners for Foreign Missions" was an old incorporation for missionary purposes, supported by Congregationalists, of which denomination testator was a member, and which had received contributions from the particular society to which the testator belonged and from the testator himself; that there was no other society with similar purposes connected with the Congregational order in the State, and in the testator's neighborhood this society was frequently called by the name used in the will. It was held that this society was entitled to the bequest, upon the ground, as the court said, "that where the name used does not designate with precision any corporation, but when the circumstances come to be proved, so many of them concur to indicate that a particular one was intended, and no similar circumstances appear to distinguish and identify any other, the one thus shown to be intended will take."

60. In *St. Luke's Home for Christian Indigent Females v. An Association for the Relief of Respectable Aged Indigent Females in the City of New York*, 52 N. Y. 191; S. C. 11 Am. Rep. 697, each party claimed a legacy to the "Society for the Relief of

Aged Indigent Females." Proof was given that the testator was an Episcopalian and that the plaintiff was a charity of that church. The testator's instructions to the draftsman were also given in evidence. The court held the plaintiff entitled to the legacy, on the face of the will, remarking that the extrinsic evidence was only confirmatory of this view, but that the instructions were of doubtful admissibility.

61. In *Chappel v. Missionary Society, etc.*, — Ind. —; 29 N. E. Rep. 924, testatrix made a bequest to the "Christian Missionary Society of this State." She was a member of the Church of Christ in Indiana, and that church had but one missionary society in the State, which was commonly known by the name mentioned in the will, although its legal name was the "Missionary Society of the Churches of Christ in Indiana." *Held*, that evidence of the above extrinsic facts was admissible to identify the legatee, and the bequest was not void for uncertainty. The court said: "The authorities seem to settle the rule in the construction of a will to be that, in looking for the intention of the testator, surrounding circumstances may be taken into consideration, but that extrinsic evidence will not be received to vary, contradict or control the terms of a will, yet that evidence of surrounding circumstances, of the subject matter of the devise, and the person to be benefited thereby, is receivable to enable the court to determine both the subject and object of the testator's bounty, and for the purpose of determining the object of a testator's bounty, or the subject of disposition, a court may inquire into every material fact relating to the person who claims under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator. In a note to *Chambers v. Watson*, 46 Am. Rep., on page 77, the law is stated thus: That 'a misnomer or misdescription of a legatee or devisee, whether a natural person or corporation, will not invalidate the provision or defeat the intention of the testator, if either from the will itself, or evidence *dehors* the will, the object of the testator's bounty can be ascertained.' No principle is better settled than that parol evidence is admissible to remove latent ambiguities, and when there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator. A corporation



may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation—and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation, and identify it as the body intended, and to distinguish it from all others, and bring it within the terms of the will, may in all cases be proved by parol."

62. In *Groves v. Calp.* — Ind. —; 31 N. E. Rep. 569, the testator devised to his wife for life "the house and lot on which I now reside, being parts of lots numbered 15 and 16," etc. By another clause, "the same lot, numbered 15, so devised to my said wife," "with all the appurtenances thereunto belonging," was devised to his daughter in fee. There was no other reference to lot 16. The court said: "Our conclusion is that if the will itself does not *ex vi termini* vest a fee in the daughter, it at least discloses a mistake on the part of the draftsman of such a nature as to make it proper to resort to extrinsic evidence. We do not say that it was necessary to resort to such evidence, for we incline to the opinion that the will itself shows that it was the intention to vest in the testator's daughter the fee to the same property as that in which a life estate was vested in the wife. We are satisfied at all events that there was no harm done the appellants in resorting to extrinsic evidence, for that evidence comports with the language of the will, and makes the intention of the testator quite clear."

63. In *Bradley v. Rees*, 113 Ill. 327; S. C. 55 Am. Rep. 422, a testator devised land to "the four boys." Parol evidence was held competent to show that he had seven sons, three adults living in their own houses, and the other four minors living with him, and his declarations before, at, and after the execution of the will were approved to show that the devise was meant for the minors.

64. In *Lefevre v. Lefevre*, 59 N. Y. 434, a legacy to the "Home of the Friendless in New York" was claimed by the defendant the American Female Guardian Society, of New York; there was no corporation of the name given in the will, but the defendant had that name over the door of its principal building, was so styled in its circulars, and so called by the trustees and the testator. On proof of this the legacy was awarded to the defendant. The proof also showed that the testator had the defendant

in mind and called it by the name in the will on the day of the preparation and execution of the will. Allen, J., said, "No principle is better settled than that parol evidence is admissible to remove latent ambiguities, and when there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be given to ascertain who were intended by the testator."

65. In *Faulkner v. Nat. Sailors' Home*, — Mass. —; 29 N. E. Rep 645, where a bequest of \$4,000 "to the Sailor's Home in Boston" is claimed by the National Sailors' Home and by the Boston Ladies' Bethel Society, both corporations chartered by Massachusetts, and transacting business in Boston, evidence that testator was a prominent Baptist, interested in the work of a Baptist church that was represented in the management of the Boston Ladies' Bethel Society, a Baptist institution, which had maintained a "Sailors' Home in Boston," since several years prior to testator's death, and prior to the date of testator's will began the creation of the "Sailors' Home Fund," which was known to the testator, was held admissible to show his intention. The court said: "In our opinion, these circumstances concerning the respective claimants, and the testator's knowledge of and interest in the sailors' home fund of the Boston Ladies' Bethel Society, with his want of knowledge of the National Sailors' Home, and the absence of all evidence showing any interest in the organization or work of that corporation, show beyond doubt that it was his intention to add his legacy to the sailors' home fund of the Boston Ladies' Bethel Society. By the words, 'to the Sailors' Home in Boston,' the testator did not intend to give the legacy to any corporation by name, either corporation or common, or by description, but did undoubtedly intend to devote it to the same charity for which he knew that the ladies' home fund of the Boston Ladies' Bethel Society was designed; and he expected that it would be administered with that fund by the society."

66. In *Tucker v. Seaman's Aid Society*, 7 Metc. 188, there was a legacy to the "Seaman's Aid Society." There was a society of that name, but the evidence showed that it was intended for, and it was claimed by, the Seaman's Friend Society. But it was held a case of bare mistake, and not amendable by parol. It is clear that after striking out the incorrect description nothing but "Society" was left to identify the real object. So in

*Yates v. Cole*, 1 Jones Eq. 110, it was held that a will cannot be corrected on evidence of mistake by striking out the name of one legatee and inserting that of another. So in *Brown v. Saltonstall*, 3 Metc. 423, where the testatrix owned and occupied a house in S., and owned several adjacent lots occupied by tenants, it was held that the latter did not pass by a devise of "my house in S. now occupied by me," and that evidence of an intention to devise them was inadmissible. So in *Walston's Lessee v. White*, 5 Md. 297, parol evidence was admitted to show the location of "Beaver Dam Branch," but not to show the testator's intention in the use of that phrase. So in *Mann v. Mann's Exrs.* 1 Johns. Ch. 231, evidence was held inadmissible to show that in the word "moneys" the testator meant to include securities. This group of cases was relied on by the dissenting judges in *Patch v. White*, *infra*.

67. In the same case the testator provided a legacy for "The American and Foreign Bible Society." There was a corporation of that name, under the management of the Baptist denomination. There was another, earlier incorporated, named "The American Bible Society," under the management of the Congregationalists and Presbyterians. The latter was sometimes called by the former name, but it did not appear that it was as well known by that name as the former society, or that the testator had ever called it or heard it called by that name. The testator attended the Congregationalist church and had no especial sympathy with the Baptist denomination. Both societies solicited contributions in the testator's neighborhood. *Held*, that evidence was inadmissible to show that the testator said to the scrivener, while drawing the will, that he wished to give the money to the Bible Society sustained by the Congregationalists and Presbyterians, and that he was not sure of its corporate name, but believed it was "The American and Foreign Bible Society." This is clearly a bare proposal to correct a mistake by parol, and not a case of latent ambiguity, for there was an existing devisee of the exact name employed in the will. The court say, there is "that certainty which under the rules of law defies any attempt to control or vary the language," and "it is a proposition to strike out a name which is perfectly descriptive."

68. In the same case, the testator provided for the Hartford Hospital a revisionary interest in the principal of annuities, and also a devise of certain lands in Ohio. By a codicil he revoked "all devises beneficial to the Hartford Hospital," and substituted a

new bequest. Evidence was offered to show that the draughtsman of the will, after its execution and before the execution of the codicil, told the testator that by the law of Ohio a bequest or devise to a corporation within twelve months of the testator's death was void ; and that the draughtsman of the codicil, on being informed of the facts about the devise of the Ohio land, asked the testator if that was all he had given the hospital, and he replied that it was. It was found as a fact that the testator intended to revoke all the provisions for the hospital in the will, and substitute the legacy, but had forgotten the bequest of the annuity money, and remembered only the devise of the Ohio land. *Held*, that the evidence was not admissible to show that he did not intend to revoke that bequest. This was an instance of mistaken recollection, and not of a latent ambiguity growing out of the language of the will as applied to the situation of the testator's property or other circumstances.

69. In *Bradley v. Rees*, 113 Ill. 327 ; S. C. 55 Am. Rep. 422, to explain a devise to " the four boys," evidence was allowed that the testator had seven sons, three adult, living in their own homes, and the other four minors, living with him, and his declarations, before and after the execution of the will, were held admissible to show that the devise was intended for the minors. So in *Phillips v. Ferguson*, 85 Va. 509 ; S. C. 17 Am. St. Rep. 78, evidence was allowed to identify " T. W. Phillips' family ;" and in *Hall v. Stephens*, 65 Mo. 670 ; S. C. 27 Am. Rep. 302, to identify " Hiram Stephens and family."

70. In *Tilton v. Am. Bible Soc.* 60 N. H. 327 ; S. C. 49 Am. Rep. 321, a legacy being provided for " the Bible Society," evidence was allowed to show what society was meant, and that an annual contribution was taken for one such society in the testator's church.

71. In *Connolly v. Pardon*, 1 Paige Ch. 291 ; S. C. 19 Am. Dec. 433, there was a bequest to the testator's brother Cormac, and by a codicil, one to his nephew Cormac, son of his brother Cormac. He had no brother Cormac, but he had a nephew of that name, the son of the complainant. On parol evidence the legacy was allowed to the complainant.

72. In *Shearman v. Angel*, 1 Bailey Eq. 351 ; S. C. 23 Am. Dec. 166, evidence was held admissible to show who were the legitimate and who were the illegitimate children, but not that the testator meant to include the latter.

73. So in *Hinckley v. Thatcher*, 139 Mass. 477 ; S. C. 52 Am.

Rep. 719, to explain a bequest to "the Home and Foreign Missionary Societies," evidence was allowed of the names by which the testator called them, the name of the religious society with which he worshipped, his interest in any particular missionary society, and his contributions for such purposes.

74. In *Goods of Brake*, 6 Prob. Div. 227; S. C. 32 Eng. (Moak.) 217, a testator appointed William McC., of Canonbury, an executor. The only persons at all answering the description were Thomas McC. and William Abraham McC. Parol evidence was admitted to show which person was intended by the testator. So in *matter of De Rosaz*, 2 Prob. Div. 66; S. C. 20 Eng. (Moak.) 597, the testator appointed certain executors, and amongst others "Percival . . . of Brighton, the father." The court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein.

*Contrary authorities:* 1. In *Kurtz v. Hibner*, 55 Ill. 514; S. C. 8 Am. Rep. 665, land in "section thirty-two" was devised to E., and land in "section thirty-one" was devised to J. *Held*, that parol evidence was inadmissible to show that the draughtsman of the will made a mistake, or that "section thirty-two" should be section thirty-three, and "section thirty-one" should be section thirty-two. This seems to be the leading American case. There is very little consideration of the point. The court observe: "There is no ambiguity in this case, as is urged. When we look at the will, it is all plain and clear. It is only the proof *aliunde* which creates any doubt, and such proof we hold to be inadmissible." Citing five cases, all of which have been hereinbefore stated, and none of which warrants this holding. The decision was criticised by Judge Redfield, in 9 *American Law Register* (N. S.) 93, where he says: "In the principal case there could be no question of the admission of oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was at the time he made the will. No reasonable man could question this upon the decided cases. This being done, it appears the testator had no such land as that described in the particular sections named. This rendered it clear, absolutely certain, we may say, that the sections named were erroneous, and could have no possible operation, and must be rejected. The devise, then, was the same as if the sec-

tions had not been named at all, or had been named, leaving the numbers blank. We are then compelled to fall back upon the remaining portion of the description, 'eighty acres of land in range ten, in township thirty-five; and forty acres of land in range ten, in township thirty-five,' and upon inquiry, we find precisely such pieces of land 'in range ten, in township thirty-five,' belonging to the testator. This renders the devise as certain as it is possible to make it. The description would not have been one whit more clear or certain if the true sections had been stated; nor is it, in fact, rendered any more uncertain by the insertion of sections thirty-one and thirty-two instead of thirty-two and thirty-three. It is entirely certain, from the language of the will, what the testator must have intended, in either form. He could not have intended to devise land to which he never had any title; he must have intended to devise land which did belong to him. He had two just such pieces of land as he names, and every way described as these are, with the single exception of this one *false particular*. It is the very case to which the maxim *fulsa*, etc., applies, and to which alone it can apply. \* \* \* But that the decision is fatally and flagrantly erroneous there can be no more question or doubt than of the axioms of geometry or the propositions in the most exact sciences. There is no proposition in the law of evidence more unquestionable than that the evidence offered was admissible in aid of the construction, and that with that aid the devise should have been upheld." As has been shown above, there was an attempt to distinguish this case by the same court in *Decker v. Decker*, 121 Ill. 341. The attempt can hardly be deemed successful. It seems that there was just as much in the one as in the other to show that the testator intended to devise real estate which he owned, and that after omitting the false part of the description there was just as much left in the one as in the other upon which the devise could lay hold.<sup>1</sup>

2. The Kurtz case was approved by the same court in *Bingel v. Volz*, — Ill. —; 31 N. E. Rep. 13, where it was held that a devise of land in the "northwest quarter" of a certain section cannot be construed to mean land in the southwest quarter. The court said: "The counsel for the appellant, while admitting that equity will not entertain a bill to reform a will, seems to us to be seeking to accomplish essentially the same thing under the guise of an

<sup>1</sup> Judge Caton made an elaborate answer to Judge Redfield's criticisms, in 9 Am. L. Reg. (N. S.) 353. See also 3 Alb. L. Journ. 263.

attempt to construe the will. It is admitted that the terms of the devise to the appellant, on their face, are clear and unambiguous, and that they accurately describe a tract of land in existence, and capable of being readily identified, and which, if the testator had owned it, would have passed to the appellant by the terms of the will. But it is insisted that, when extrinsic evidence is applied to the devise, a latent ambiguity is raised, and that such evidence may therefore be resorted to for the purpose of explaining the ambiguity and showing what land the testator intended to devise to the appellant. The purpose of construction, as applied to wills, is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. While in attempting to construe a will, reference may be made to surrounding circumstances, for the purpose of determining the objects of the testator's bounty, or the subject of disposition, and with that view, to place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed. \* \* \*

We are aware that other courts whose opinions are entitled to the highest consideration, have gone considerably further than we have been disposed to do in holding that mistakes of the character of the one presented here constitute cases of latent ambiguity which may be explained, and in effect corrected by extrinsic evidence. It cannot be denied that decisions which so hold are based upon reasons which are at least plausible, and if the question were a new one in this State, we might feel disposed to give them serious attention. But the contrary rule has long been in force here, and has become a rule of property, and a change now by judicial construction, which must necessarily be given a retroactive operation, would have the effect of unsettling titles of very considerable value, which rest upon the rule which we have heretofore laid down. We must therefore adhere to our former decisions, although in particular cases the result may be to defeat the real intentions of testators, which, by mistake of those charged with drafting their wills, they have failed to adequately express.

"But it is contended that the real intention of the testator in

the present case, as shown by the extrinsic evidence, and his intention as expressed in the language of the devise, may be brought into harmony by rejecting a portion of the description of the land devised as repugnant, as was done in *Decker v. Decker*, 121 Ill. 341. The rule of construction here referred to is the one indicated by the familiar maxim, *falsa demonstratio non nocet*, and is applicable alike to the construction of deeds and wills. \* \* \* Doubtless if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of construction might be adopted. But we are unable to see, and the ingenuity of counsel has been unable to point out, any way in which that rule of construction can be applied, so as to work out the result sought to be attained. The description in the devise, as we have already seen, is in these words: 'Seventy acres off of the south side of the north one-half of the northwest quarter of section No. sixteen, township No. five, range No. six W. of the third principal meridian, county of Madison, State of Illinois.' If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected so as to leave a description which will apply to the land which the appellant claims. If we reject the words 'northwest quarter,' or 'northwest,' or 'north,' what remains does not apply to the land in question."

3. In *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; S. C. 14 Am. Rep. 538, there was a devise of the "west half of the northeast quarter of section 23," in T. township. *Held*, that parol evidence was inadmissible to show that testator owned the east half of the southwest quarter of section 23, and no other land, and that the draughtsman of the will had erred in putting the one description for the other. This was founded in some degree on *Kurtz v. Hibner*, but was much better considered. The court say: "Where a latent ambiguity is discovered, evidence of extrinsic facts may be admitted in aid of the exposition of the will, to determine whether *the words of the will*, with reference to the facts, admit of a plain application; and if not, then to determine whether the words can be applied in any other sense of which they are capable, so as to satisfy the intention of the testator. In all the cases coming within the scope of our investigation of this ques-



tion, where extrinsic evidence has been admitted to remove a latent ambiguity, the language of the will, after rejecting the false description, has been sufficient to show *what property* or *what person* was intended by the testator. \* \* \* If there is no person or no property corresponding to the description *in all particulars*, but there is one corresponding in many particulars, and no other that can be intended, the false description will be rejected, and the property corresponding to the description in other particulars is held to pass, or the person thus answering the description will take under the will. But we have seen no case where other words than the words of the devise have been allowed to be imported into the will in order to describe a devise, or to identify to which the words of the description in the will did not apply, upon the principle above stated. And when by rejecting the false description the remaining words do not describe the property to any extent, parol proof to show the testator's intent is inadmissible. \* \* \* If the false description be rejected, then there are no words left in the will to describe the premises under it. \* \* \* The description is single, with nothing left after rejecting that which is erroneous." It is in these last two sentences that the error of the court seems to lie, for rejecting the false description, "the west half of the northeast quarter of," there is still left the entirely sufficient description, "That tract of land situated in Table Mound Township, Dubuque county, Iowa, described as follows: section 23, in Table Mound Township, Dubuque county, Iowa," and this would have been sufficient to carry that portion of that section which the parol evidence showed that the testator did own. The only answer to this argument, in the opinion, is the following: "And we have found no case which will justify a court in presuming, upon the mere fact of a bequest, that the testator intended to assert his ownership of the thing bequeathed, and that such assertion should be considered as implied, and taken as part of the description of the part devised." But as it is the conceded duty of courts so to interpret wills as to effectuate the intentions of the testator, it would seem that there should be a presumption that the testator owns what he undertakes to give, and if any part of the description answers his claim of ownership, it should not fail for lack of a declaration of ownership. This is Lord Langdale's opinion, when he says,<sup>1</sup> "I cannot assume that the testatrix meant nothing

<sup>1</sup> Lindgren v. Lindgren, 9 Beav. 358.

by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty."

4. In *Judy v. Gilbert*, 77 Ind. 96; S. C. 40 Am. Rep. 289, the plaintiff's complaint stated in substance that the testator had borrowed money of his wife, to buy the "northeast quarter of the southeast quarter of section 29, in township 37, of range 11 east, situate in Lagrange county, Indiana," agreeing to devise the land to her for life, with remainder to her children; that he executed his will, intending to conform to that agreement, but by mistake the will described the land as the "northeast quarter of the southwest quarter," and that he owned no such land, and no other land than the lot misdescribed. *Held*, that parol evidence of such facts was inadmissible. This is a case where enough was left to carry the land after dropping the false description, namely, the numbers of section, township and range, and the county and State. The court rely on *Bishop v. Morgan*, *Kurtz v. Hibner*, *Fitzpatrick v. Fitzpatrick*, *Reynolds v. Robinson*, *Griscom v. Evans*, the two last of which have been shown not to be in point, and disapprove the cases "holding a different doctrine." The decision proceeds upon the entire exclusion of parol evidence, the court observing: "There is no mistake here upon the face of the will which is here the subject of investigation. There is no latent ambiguity. The property devised is accurately described. The claim is not that there is an inaccurate description apparent upon the face of the will, but that the testator ought to have described some other property. The court is asked to admit parol evidence to show that although the testator described with perfect accuracy one parcel of land he meant another. The bare statement of appellant's position exposes its hostility to fundamental and salutary principles of jurisprudence." So in *Sturgis v. Work*, 122 Ind. 134; S. C. 17 Am. St. Rep. 349, evidence was refused to apply "west half southwest quarter," which the testator did not own, to "west half northeast quarter," which he did own. The court said: "If the testator had devised the land by some general description by which it might have been identified, as for example, if he had said 'all my land' in a certain section or township or 'the lot purchased by me from A.', or 'the tract of land occupied by B.', and had then added an erroneous particular description, a case would have been presented for the admission of extraneous evidence," etc. But here the testator owned other

lands, and after several specific devises, made a residuary devise to another person. This serves to take the case out of the general rules, for the northeast quarter had passed, if not by specific devise, yet by the residuary devise.

5. In *Bishop v. Morgan*, 82 Ill. 358; S. C. 25 Am. Rep. 327, it was held that where a will describes a tract of land devised as the southeast quarter of a section containing forty acres, more or less, the description of the quantity does not control the description of the land, and the court will not consider the fact that the testator did not own the land described, but did own the southeast quarter of the northeast quarter of that section, at the time of making the will and of his death. Following *Kurtz v. Hibner*.<sup>1</sup>

6. In *Griscom v. Evens*, 11 Vroom 402; S. C. 29 Am. Rep. 251, the testator owned two parcels of land near Cropwell; one containing seventy-two and sixty-two-hundredths acres, which had been conveyed to him by the heirs of his deceased wife, the other containing fourteen and seventy-three-hundredths acres, which had been conveyed to him by Abel Lippencott. The two parcels adjoined each other, had long been rented and cultivated together, and his son Thomas resided on the first, but used and cultivated both. The testator devised to his son Thomas "all that my farm and plantation near Cropwell conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides, containing about eighty-five acres more or less." The court admitted the testimony of the draughtsman of the will, that the written instructions for the will contained only the words "my Cropwell farm containing eighty-five acres," and that the words "conveyed to me by the heirs of my deceased wife," were inserted by the draughtsman himself in the will, to distinguish the premises from the testator's other property. *Held*, error, and that only the parcel conveyed to the testator by the heirs of his deceased wife passed under that devise. This was a case of bare mistake. There was no latent ambiguity, for the parcel was distinguished by the language indicating the source of the testator's title and the residence of his son Thomas, and the language exactly and unambiguously fitted that parcel, and no ambiguity was attributable to a mistaken estimate of the number of acres, especially as it was stated to be "more or less." The court correctly observe that the difficulty is to be solved "by the rejection

<sup>1</sup> See *Bond's Appeal*, 31 Conn. 183; *Boggs v. Taylor*, 26 Ohio St. 604.

of such of the words of description as appear to be surplusage or a mere false demonstration."

7. In *Farnham v. Barker*, 148 Mass. 204, the testator had given his housekeeper his note for "extra work and care" during his illness. In his will, three years and a half later, he bequeathed her a sum of money on the condition that she "bring no bill" against his estate for labor and services. It was held that the note was enforceable as well as the legacy, and that parol evidence to show the contrary intention of the testator was not admissible.

8. In *Sherwood v. Sherwood*, 45 Wis. 357; S. C. 30 Am. Rep. 757, the complaint, in an action to correct a will and remove a cloud from title, alleged that a testator, at the time of making his will, and thereafter until his death, owned lot 10 in a certain block; that the plaintiff at those times and ever since owned, in fee simple, lot 9 in the same block; that by said will the testator devised said lot 10 to plaintiff; but that in drawing the will, lot 10 was by mistake described as lot 9; that the will contained *no other mention or description of said lot 10*; and that at the time of the making of said will plaintiff was, and ever since has been, in the actual possession of said lot 10. *Held*, on demurrer, that there was nothing in the will, as thus described, upon which to base a construction of it as devising lot 10 to plaintiff. It did not appear that there was any ambiguity, but it was a mere ineffectual attempt to devise a lot which the testator did not own and which the plaintiff did own, and there was no other reference to the testator's lot which might have identified it as the real object of the devise. This case comes under the rule excluding evidence to prove a mere mistake.

To the effect that extrinsic evidence is inadmissible to show a mere mistake are the cases in the foot-note.<sup>1</sup>

*Time of declarations:* As to the time of the declarations

<sup>1</sup> *Rothmahler v. Myers*, 4 Desau. 215; S. C. 6 Am. Dec. 613.

*Iddings v. Iddings*, 7 S. & R. 111; S. C. 10 Am. Dec. 450.

*Comstock v. Hadlyme Ec. Soc.* 8 Conn. 254; S. C. 20 Am. Dec. 100. the case of omission of legacies by the draftsman.

*Barnes v. Simms*, 5 Ired. Eq. 392; S. C. 49 Am. Dec. 435, a case where there was a bequest of slaves "Aaron"

and "Pike," and the testator had none of those names, but had "Lamon" and "Pite."

*Hall v. Hall*, 8 Rich. L. 407; S. C. 64 Am. Dec. 758, where the attempt was to show that a provision for the testator's widow was intended to be in lieu of dower.

See also *Ehrman v. Hoskins*, 67 Miss. 192; S. C. 19 Am. St. Rep. 297.

there is a good deal of conflict. The cases divide into four classes, as follows:

*First.* Declarations by the testator, at the time of making his will, are admissible.<sup>1</sup> *Second.* Declarations of intention made before or after the date of the will are inadmissible.<sup>2</sup> *Third.* Judge Cowen says that declarations of the testator, at the time of making the will, explaining the meaning of the terms or defining the property intended to be devised, may not be received in evidence; but if made before or after the execution of the will, proof of such declarations is admissible.<sup>3</sup> *Fourth.* Lord Denman says, in *Doe dem. Allen & Allen*, 12 A. & E. 451, that such declarations are admissible, whether contemporaneous or subsequent, but that the weight to which they are entitled will differ according to the time and circumstances under which they were made.<sup>4</sup>

*First:* 1. In *Cheyney's* case, 5 Rep. 68, it was said, in reference to a query as to which "son John" was meant, it "may easily be known by him who wrote the will and others who were privy to his intent."

2. In *Thomas v. Thomas*, 6 T. R. 677, Lord Kenyon said the declarations were made "long before the will was made; though had they been made at the time of making the will I should have thought them admissible in evidence." Lawrence, J., said: "I thought that a will could not be construed by any declarations made by the testator before the making of the will; but that his intention must be collected from the words of the will, or from what passed at the time of making it." It thus appears not to be an authority to sustain Wigram's citation of it under this head.

3. A very strong case of contemporaneous declarations is *Wagner's Appeal*, 43 Penn. St. 102. There was a bequest to

<sup>1</sup> Wigram Ext. Ev., Prop. 7.

Selwood v. Mildmay, 3 Ves. Jr. 306.

Hampshire v. Peirce, 2 Ves. 216.

Thomas v. Thomas, 6 T. R. 671.

White v. Williams, 3 Ves. & Bea. 72.

Harris v. Bishop of Lincoln, 2 P. Wms.

137.

Cleverly v. Cleverly, 124 Mass. 314.

Morgan v. Burrows, 45 Wis. 211.

<sup>2</sup> Wig. Ext. Ev., Prop. 7.

Thomas v. Thomas, *supra*.

Strode v. Russel, 2 Vern. 625.

<sup>3</sup> Ryerss v. Wheeler, 22 Wend. 151, 153

<sup>4</sup> Price v. Page, 4 Ves. Jr. 680.

Beaumont v. Fell, 2 P. Wms. 141.

Langham v. Sanford, 19 Ves. Jr. 649.

Vernor v. Henry, 3 Watts, 385.

Wadsworth v. Ruggles, 6 Pick. 63.

Haydon v. Ewing's Devisees, 1 B.

Monr. 113.

Ayres v. Weed, 16 Conn. 302.

Maud's Adm'r v. M'Phail, 10 Leigh,

207.

Powell v. Biddle, 2 Dall. 70.

Doe v. Roe, 1 Wend. 549.

Blundell v. Gladstone, 11 Sim. 467.

Morrell v. Morrell, 7 P. Div. 68.

Trustees v. Colgrove, 4 Hun, 362.

"Lavinia, daughter of my brother John," deceased; John left no daughter of that name; Lavinia, a daughter of the testator's cousin, claimed the legacy; but the court awarded it to Casandra Emig, daughter of John, on the strength of the testator's declarations at the time of making the will.

*Second.* From what has been said above it appears that *Thomas v. Thomas* is an authority against Wigram's citation of it under this head. In *Strode v. Russel*, 2 Vern. 625 (A. D. 1708), it was held: "Nor is any regard to be had as to the expressions, before or after the making of the will, which possibly might be used by the testator on purpose to control or disguise what he was doing, or to keep the family quiet," etc. But this was put on the ground that no parol proof was receivable to show which "one of the sons of J. S." was intended, and if he had several, the devise was void; a doctrine certainly no longer in vogue.

*Third.* Judge Cowen's language as to the non-admissibility of contemporaneous declarations, in *Ryerss v. Wheeler*, was obviously a mere *dictum*, not called for by the evidence, and was founded on cases where there was no latent ambiguity, for the question being as to the meaning of the words "back lands," he said the declarations "are clearly receivable as giving a name or character either to the devisee or the property devised; and that too, as appears by the cases, whether such declarations be made before or after the will was executed." There is probably no case warranting or following this *dictum* when applied to a case of latent ambiguity. See remarks on this case in *Morgan v. Burrows*, 45 Wis. 218.

*Fourth:* 1. In *Langham v. Sanford*, 19 Ves. Jr. 649, Lord Chancellor Eldon says: "It is unfortunate, but it is certainly settled, that declarations at the time of making the will subsequent and previous to it, are all to be admitted; yet we know that what men state as to their intentions may be conformable to their purpose at the time but not afterwards; and declarations by a testator after having made his will are frequently made for the purpose, not of fairly representing, but of misrepresenting, what he had done."

2. In *Doe v. Allen*, 12 Ad. & Ell. 455, Chief Justice Denman says: "Cases are referred to in the books to show that declarations contemporaneous with the will are alone to be received; but on examination, none of them establish such a distinction.

Neither has any argument been adduced which convinces us that those subsequent to the will ought to be excluded, wherever any evidence of declarations can be received. They may have more or less weight, according to circumstances," etc.

3. In *Powell v. Biddle*, 2 Dall. 72, the court said: "The bequest was made to a person who was always called *Samuel* by the testator, though in fact named *William*, and whom the testator had nurtured and educated from his infancy; when on the other hand he did not even know the person really called *Samuel*." It appeared that there was a person actually representing the description. So the evidence was admitted to show a bare mistake.

4. In *Doe dem. Gord v. Needs*, 2 M. & W. 129, to show that by the phrase, "George, son of Good," the testator meant the son of George Good, the testator's declarations were held admissible, but what species of declarations the case does not show. So it was *obiter* conceded, by Lord Abinger, in *Hiscocks v. Hiscocks*, 5 M. & W. 368, that proof of the testator's declarations would be admissible to explain a latent ambiguity, but no species was defined.

5. In *Reynolds v. Whelan*, 16 L. J. (N. S.) Ch. 435, parol evidence was admitted to explain "W. R., one of my farming men," in the will of a farmer who had two servants of that name, one of whom worked exclusively on the farm and the other on the farm and in the house; and the legacy was awarded to the latter. The evidence included his declaration that he had left "Old Will" £50 by a former will, and intended making it £100, which was the amount of the legacy.

*Intention*: It is clear that the intention provable by the testator's declarations must be limited to his intention at the time of making the will. This is the language of *Whitaker v. Tatham*, 7 Bing. 637 — "restrained to proof of what was the intention at the time of making the will." This may be thought to exclude prior declarations, but not necessarily so, for they may definitely point to that time. That it is the time of the intention and not of the declaration that the court meant, is evident from the further language, "if evidence had been given of his declarations of intention at subsequent periods, greater effect would have been given to a nuncupative than to a written and attested will. Although therefore we may receive evidence of a testator's declarations, it must be confined to such as bear upon his intentions at the time of making the will."

It may be that the distinction which Wigram draws between contemporaneous declarations and prior and subsequent declarations was based on a wrong reading of this case and possibly other cases, in which it was left a little ambiguous whether the "time" was applied to the declarations or to the intentions.

But declarations of the testator, before or after the making of the will, are not admissible in proceedings in subversion of the provisions of the will, except on the question of his mental capacity.

This was held in *Provis v. Reed*, 5 Bing. 435, a case where both parties in ejectment claimed under the testator. The declarations excluded were subsequent. Best, C. J., pronounced them "contrary to the principles of evidence," and "in the highest degree inconvenient," and "never yet received," and Park, J., said they would be "most mischievous." The same was held of subsequent declarations, in *Jackson v. Kniffen*, 2 Johns. 31; S. C. 3 Am. Dec. 390, by Kent, C. J., and two other judges, two judges dissenting. In *Waterman v. Whitney*, 11 N. Y. 157; S. C. 62 Am. Dec. 71, Selden, J., declared that the subsequent declarations are admissible only "1, to show a revocation of a will admitted to have been once valid; 2, to impeach the validity of the will for duress, on account of some fraud or imposition practiced upon the testator, or for some other cause not involving his mental condition; 3, to show the mental incapacity of the testator, or that the will was procured by undue influence;" and "that upon a question of revocation no declarations of the testator are admissible except such as accompany the act by which the will is revoked, such declarations being received as part of the *res gestæ*, and for the purpose of showing the intent of the act." Citing *Doe v. Perkes*, 3 B. & Ald. 489, *Dan v. Brown*, 4 Cow. 483; S. C. 15 Am. Dec. 395, *Jackson v. Betts*, 6 Cow. 377, and disapproving *Bibb v. Thomas*, 2 W. Bl. 1044, and *Durant v. Ashmore*, 2 Rich. 184. So in *Marx v. McGlynn*, 88 N. Y. 374, it was held that diaries and letters kept and written by the testator before and after the execution of the will, although receivable on the question of his mental capacity, were not competent to prove fraud or undue influence. So in *Comstock v. Hadlyme Ec. Soc.* 8 Conn. 254; S. C. 20 Am. Dec. 100, declarations "about" the time of making the will, introduced to show undue influence, were held admissible only to show the state of the testator's mind. The court said: "It should have been stated to be at the time;" "about the time is too indefinite." The same was



held in *Moritz v. Brough*, 16 S. & R. 403, *Shailer v. Bumstead*, 99 Mass. 112, and *Gibson v. Gibson*, 24 Mo. 227, as to subsequent declarations, and in *Norris v. Sheppard*, 20 Pa. St. 475, as to previous declarations. So in *Boylan v. Meeker*, 4 Dutch. 274, and *Stevens v. Vancleve*, 4 Wash. 265, as to previous and subsequent declarations. Contemporaneous declarations were admitted in *Robinson v. Hutchinson*, 26 Vt. 38. The authorities are well reviewed in *Couch v. Eastham*, 27 W. Va. 796; S. C. 55 Am. Rep. 346, and previous and subsequent declarations were held inadmissible to prove that the will was executed by mistake.

*Contrary doctrine:* The reason given by Spencer, J., for his dissent in *Jackson v. Kniffen* was that the declarations were "made at a time when no one had a vested interest in opposition to him." This reasoning was adopted by the court in *Reel v. Reel*, 1 Hawks, 248, and *Howell v. Barden*, 3 Dev. 442. In *Smith v. Fenner*, 1 Gall. 170, previous declarations were admitted to show fraud. In *Nelson v. Oldfield*, 2 Vern. 76, the court would not permit the will to be contradicted because it had been proved in the spiritual court, and the admissibility of the declarations was not passed upon. Declarations were allowed to show revocation in *Durant v. Ashmore*, 2 Rich. L. 184, which Selden, J., in *Waterman v. Whitney*, pronounces "the only direct decision" to this effect. The point received slight consideration, and the basis of admission was that "they would be directly in aid of the presumption of fact arising from the circumstances that no last will was found at his death."

## Sec. 127. Deciphering.

Parol evidence is admissible to decipher the writing or translate the language of a will or inform the court of the meaning of words.

As to explain the meaning of "Mod," in the will of a sculptor;<sup>1</sup> of "i. x. x." and "o. x. x." representing sums of money;<sup>2</sup> a nickname;<sup>3</sup> a reputed name;<sup>4</sup> words peculiar to a religious sect;<sup>5</sup> "Mrs. G.;"<sup>6</sup> "—Price;"<sup>7</sup> "Percival —;"<sup>8</sup> but not of "Lady —."<sup>9</sup>

<sup>1</sup> *Goblet v. Beechey*, 3 Sim. 24.

<sup>2</sup> *Kell v. Charmer*, 23 Beav. 195.

<sup>3</sup> *Lee v. Pain*, 4 Hare, 252.

*Powell v. Biddle*, 2 Dall. 72.

<sup>4</sup> *Rivers Case*, 1 Atk. 410.

<sup>5</sup> *Selden v. Williams*, 9 Watts, 9.

<sup>6</sup> *Abbot v. Massie*, 3 Ves. 148.

<sup>7</sup> *Price v. Page*, 4 Ves. 680.

<sup>8</sup> *Matter of DeRosaz*, 2 P. Div. 66.

<sup>9</sup> *Hunt v. Hort*, 3 Bro. C. C. 311.

## Sec. 128. Ademption.

Where the will is not explicit, parol evidence is competent on the question of ademption of legacies, including proof of the situation and circumstances, and of declarations of the testator at and after the making of the will.<sup>1</sup>

But this does not apply to devises of land.<sup>2</sup> The court said: "There is no logical reason why a money payment ought not to satisfy a devise as well as a legacy where such was the purpose and intent of the parties as here. But so far as authorities can be found they are hostile to such a doctrine." Citing *Davys v. Boucher*, 3 Y. & Coll. 397; *Weston v. Johnson*, 48 Ind. 1; *Langdon v. Astor* 16 N. Y. 1.

## Sec. 129. Oral will.

An oral promise to give a legacy or provide for one by will, on an executed consideration, is valid and enforceable.

Schouler says (Wills, § 454): "Where one contracts, upon valuable consideration, to execute a will after a certain tenor, the agreement is binding upon his death, and may be specifically enforced against his representatives and his estate."<sup>3</sup>

But in *Wall's Appeal*, 111 Pa. St. 460; S. C. 56 Am. Rep. 288, it was held that an oral promise of a decedent that if his niece would live with him and his wife he would give her a good home

<sup>1</sup> *Rogers v. French*, 19 Ga. 316.

*May's Heirs v. May's Adm'r.*, 28 Ala. 141.

*Webley v. Langstaff*, 3 Desau. 504.

*Gilliam v. Chancellor*, 43 Miss. 437; S. C. 5 Am. Rep. 498.

*Allen v. Allen*, 13 S. C. 512; S. C. 36 Am. Rep. 716.

*Richards v. Humphreys*, 15 Pick. 153.

*Shudal v. Jekyll*, 2 Atk. 516.

*Rosewell v. Bennett*, 3 Atk. 77.

*Kirk v. Eddowes*, 3 Hare, 509.

*Jones v. Mason*, 5 Rand. 577; S. C. 16 Am. Dec. 761.

*Van Houten v. Post*, 33 N. J. Eq. 344.

<sup>2</sup> *Burnham v. Comfort*, 37 Hun, 216.

<sup>3</sup> *Walpole v. Orford*, 3 Ves. 402.

*Caton v. Caton*, L. R. 1 Ch. 137; S. C. L. R. 2 H. L. 127.

*Gould v. Mansfield*, 103 Mass. 408; S. C. 4 Am. Rep. 573.

*Anding v. Davis*, 38 Miss. 574.

*Izard v. Middleton*, 1 Desau. 116.

*Ex parte Day*, 1 Bradf. 476.

*Bolman v. Overall*, 80 Ala. 451.

*Carmichael v. Carmichael*, 72 Mich. 76.

*Myers v. Cronk*, 45 Hun, 401.

*Sharkey v. McDermott*, 91 Mo. 647; S. C. 60 Am. Rep. 270.

*DeMoss v. Robinson*, 46 Mich. 62; S. C. 41 Am. Rep. 144.

*Eaton v. Benton*, 2 Hill, 576.\*

*Jilson v. Gilbert*, 26 Wis. 637; S. C. 7 Am. Rep. 100.

as long as he lived, and provide for her at his death, and she should never want as long as she lived, is too indefinite for enforcement.

In *Howard v. Brower*, 37 Ohio St. 402, it was held that an alternative oral promise to compensate a party either in land or money was void, and in *De Moss v. Robinson*, 46 Mich. 62; S. C. 41 Am. Rep. 144, it was held that such oral promise is revocable, and as to real estate is void.

In *Kurtz v. Hibner*, 55 Ill. 514; S. C. 8 Am. Rep. 665, the court, as we have seen, having excluded evidence to show a mistake in the number of the lot devised, and thus prevented the operation of the will, approved evidence to establish an oral promise by the testator to convey the lot in question to his child, by virtue of which the child had taken possession and made valuable improvements; and in an action of partition decreed specific performance in favor of the child who claimed the lot as devisee.

### Sec. 130. Revivor and Revocation.

On the question of revivor or revocation of a will, parol evidence is competent, including the declarations of the testator, to characterize the act and show his intent.

Such evidence is generally held admissible, but the force and effect of it is variously interpreted in different jurisdictions, and some courts limit the admission to such declarations as are made at the time of the act and constitute part of the *res gestæ*.

"The nature of the act itself, the condition in which the instrument is left, the circumstances attending the act, the expressions of testator and others at the very time, may therefore be shown, in so far as they make up the *res gestæ*. All these instances are well illustrated in the following cases. In addition to these facts, parol evidence is also admissible of testator's declarations made even afterward. But just as in discussing the admissibility of testators' declarations on the issues of mental incapacity and undue influence, we have already seen that such declarations, in so far as they are not part of the *res gestæ*, are admissible, *not* as in themselves evidence of the allegations embodied in them, *but only* as evidence of the state of mind, at the date of execution, of the person making them; so also on the question of *intent* in acts implying revocation, testator's declara-

tions are admissible to show his state of mind in the matter of intent, as a fact, at the time he did the act. But they are not admissible as evidence of whether, having the state of mind shown, he did in fact effect a legal revocation. Thus if he did in reality have the intent to revoke, and did in reality do acts legally sufficient to carry that intent into effect, then his subsequent declarations, no matter how positive, cannot in effect re-establish the will. But yet his declarations and conduct afterwards may logically go to show that at the time he did the acts relied on as effecting revocation, he did, or did not, have any intent to revoke by those acts. And to this extent and for this purpose evidence of his declarations and conduct is admissible."<sup>1</sup>

1. In *Waterman v. Whitney*, 11 N. Y. 158, Selden, J., said: "It is proper to premise that the revocation of a valid will is a matter which not only in England, but in this State, and in most if not all the other States, is regulated by statute; and these statutes are substantially the same; those in this country being for the most part taken from the English statute of frauds. Most, if not all, these statutes require either a written revocation executed with the same formalities as the will itself, or some act amounting to a virtual destruction of the will, such as burning, tearing, obliterating, etc., accompanied by an unequivocal intention to revoke it. Mere words will in no case amount to a revocation.

"Under these statutes therefore the only possible purpose for which evidence of the declarations of the testator can be given, upon a question of revocation, is to establish the *animo revocandi*, in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are in the main in harmony with each other, and in general entirely accord with the view here presented. I will refer to a few of the most prominent. *Bibb v. Thomas* (2 W. Bl. 1044) was a case of revocation by throwing the will on the fire. The will was not consumed, but fell off the fire, and was taken up and saved by a bystander without the knowledge of the testator. The court held the revocation complete. The case was held to depend upon the intent with which the will was thrown upon the fire; and to establish this intent, the declarations of the testator, both at the time of the transaction and *afterward*, were received. So far as regards the declarations which accompanied the act, this

<sup>1</sup> Chaplin Wills, 327.

was in accordance with general principles, and with all the other causes; but I apprehend that the declarations of the testator, made after the transaction was over, could not in such a case be properly received. This distinction however was not taken, and the question did not arise. *Doe v. Perkes and others* (3 Barn. & Ald. 489) was a similar case, in which the declarations of the testator showed that he had abandoned the intention to destroy the will before the work of destruction was complete. No declarations were proved in this case except those which were clearly a part of the *res gestæ*. In the case of *Dan v. Brown* (4 Cow. 483), it was insisted by the counsel that upon a question of revocation the declarations of the testator, made either before or *after* the act relied upon, were admissible, as well as those which accompanied the act itself; but the court held that the declarations accompanying the act, such as were part of the *res gestæ*, were admissible for the purpose of showing the *quo animo*; but that no others could be received. In *Jackson v. Betts* (6 Cow. 377) the main question was whether a will, proved to have been once properly executed, but which could not be found after the death of the testator, had been canceled or destroyed and thus revoked, or whether it continued in force; and evidence was offered of the declarations of the testator, during his last sickness, as to the existence of his will, and the place where it would be found. The Supreme Court held the evidence not admissible. The case ultimately went to the Court of Errors, and the chancellor there expressed doubts as to the correctness of the decision of the Supreme Court upon the point, but did not overrule it. (See 6 Wend. 173).

"I consider these cases as establishing the doctrine that upon a question of revocation no declarations of the testator are admissible, except such as accompany the act by which the will is revoked; such declarations being received as a part of the *res gestæ*, and for the purpose of showing the intent of the act.

"The only direct decision to the contrary which has fallen under my observation is the case of *Durant v. Ashmore* (2 Rich. Law [S. C.] 184). This case however is in conflict with authority as well as with principle. The fact to be proved in such cases is, the act claimed as a revocation, together with the intent with which it was done; and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay, and should be treated as such."

2. In *Pickens v. Davis*, 134 Mass. 252; S. C. 45 Am. Rep. 322, it was held that the mere cancellation of a will containing a clause revoking former wills does not revive a former will, but the subsequent declarations of the testator are competent to show that he meant to revive a former and existing will. The court said: "The question therefore is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by the cancellation of the second will, to revive the first; because in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended on what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous or subsequent, may be proved in evidence. In the great case of *Sugden v. St. Leonards*, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but this being afterward questioned, it was declared and held, on the greatest considera-

tion, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of *Keen v. Keen*, L. R., 3 P. & D. 105, is to the same effect. See also *Gould v. Lakes*, 6 P. D. 1; *Doe v. Allen*, 12 A. & E. 451; *Usticke v. Bawden*, 2 Add. Ecc. 123; *Welch v. Phillips*, 1 Moore P. C. 299; *Whiteley v. King*, 10 Jur. (N. S.) 1079; *Re Johnson's Will*, 40 Conn. 587; *Lawyer v. Smith*, 8 Mich. 411; *Patterson v. Hickey*, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed., by Bigelow), 130, 133, 134, 142 and notes. The question was also discussed, and many cases were cited, in *Collagan v. Burns*, 57 Me. 449, but the court was equally divided in opinion. Many though not all of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations."

3. In *Warner v. Warner*, 37 Vt. 356, the testator made his will in 1857, and wrote it mostly on one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterward wrote below all the writing and near the middle of the sheet, "This will is hereby cancelled and annulled in full this 15th day of March, 1859," and it was held to amount to a revocation of the will by "cancelling," and that it could not be thereafter revived by parol declarations of such a purpose or desire on the part of the testator. The court say: "The only remaining question is as to the republication claimed by the proponent to have been made by sayings of the testator a few days before his death. The will was revoked by the act of cancelling. The law of this State, in cases like the present, recognizes as valid such wills as are made in the mode prescribed by the statute, which statute prescribes the only mode in which they may be revoked. When thus revoked, it would seem quite incongruous that the instrument could be restored to its original vitality and force by mere words, without any further act done upon, or with reference to, such instrument \* \* \* the evidence, upon which the point as to republication is predicted could only bear upon the question of the intent of the testator in doing the act of revocation."

4. In *Giles v. Warren*, L. R. 2 Prob. & Div. 401; S. C. 3 Eng. Rep. 480, Lord Penzance said: "If the will had been once revoked, the testator could not set it up again by subsequent declaration," but in that case the remark was *obiter*.

5. In *Matter of Fransen's Will*, 26 Penn. St. 202, the Pennsylvania court doubted whether, since the act of 1833, a parol republication of a will made after the passage of said act, was good in any case, and the court reviewed the Pennsylvania cases and showed that in all of them that hold a parol republication valid, the wills were made prior to the act of 1833, and that consequently they were not affected by its provisions, but were to be determined in accordance with what the law had been hitherto, and they said, "It is a fundamental rule recognized and admitted in all the cases, both English and American, that republication must be attended with the same solemnities as are required to attend the execution of the will originally. Hence under our old act of 1705, a will might be republished by a parol declaration merely, *because* neither signature, seal nor attestation of witnesses was *necessary to its execution*. But by our act of 1833, *every will* must be signed at the end thereof 'by the testator or by some person in his presence \* \* \*'; now applying either the statutory rule or that general one which prevails in the courts, I do not see how a written will is to be republished by parol. If signing be necessary to the execution of the will, signing must be indispensable to republication. Signature is certainly a very important part of the solemnities of execution. How can it be dispensed with in republications? It is a mistake to suppose this court has ever decided that it can."

6. In *Matter of Simpson's Will*, 56 How. Pr. 125, the testator, S., made his will in 1871, disposing of his entire estate; in 1872 he executed a codicil, making a different disposition of personalty to the amount of \$50,000; in 1876 he burned the codicil with the intention of revoking it; he then held the will of 1871 in his hand and declared in the presence of two witnesses: "This is my last will and testament, I shall never make another;" wrote a direction to his executors referring to the will as his last will, inclosed it and the will in an envelope and wrote upon it: "The last will of William Simpson, dated August 18, 1871;" sealed the envelope so that it could not be opened without detection, and carefully preserved it among his valuable papers until his death. Upon proceedings being taken by the next of kin within one year after its probate to contest its validity and the competency of its proofs, it was held that where a codicil impliedly revokes a will in part, by reason of inconsistent provisions, the destruction of the codicil *animo revocandi*, revives the provisions of the will revoked



by its execution. But where a second will is revoked by destroying it, acts and declarations of the testator accompanying the destruction, evincing an intention to revive and give effect to a former will, are not sufficient for that purpose unless they amount to a republication of the former will.

7. In *Tucker v. Whitehead*, 59 Miss. 594, on the question of declarations of a testator in support of or against revocation, the court (p. 605-6) say: "There are few questions in the law upon which the authorities are more hopelessly in conflict than upon the admissibility of the declarations of a deceased testator in support or in rebuttal of a supposed revocation of a testamentary paper. It has engaged the attention and elicited the logic of the greatest jurists who have adorned the bench of this or any country. Against the admissibility of such evidence are to be found the names of Kent and Story and Livingston, and in favor of it those of Walworth and Ruffin and Lumpkin and Cooley. Certainly we can hope to add nothing to the strength of an argument, on either side, which has already been exhausted by such men as these. Whatever may be the true rule where the act which the law accepts as itself evidence of a revocation is undoubtedly shown to have been done by the testator, we think it clear that testimony such as was offered here should always be received, where as in this case, it is uncertain whether the act was committed by the testator, or was the unauthorized or criminal act of a spoiler. The law makes the destruction or mutilation of a will by the testator sufficient evidence of a design to revoke it, and whether any declarations by him, other than those which accompany the act and thereby become a part of the *res gestæ*, should be receivable in evidence, to contradict or explain the act, may well admit of doubt; but where the fact that he was the author of the destruction or mutilation is itself first presumed, from the place where the paper is found, and upon this presumption, there is built up the further presumption that it was done *animo revocandi*, it would seem that something more than presumption should be let in. In such a case it is a part of wisdom to open the doors as wide as possible for the reception of every species of evidence at all calculated to advance the discovery of truth, since not to do so must in a great number of cases result in defeating the will of the deceased by accident or fraud. The evils which may spring from the introduction of parol proof in such a case are less than those which must be wrought

by its exclusion. We append a few of the authorities permitting the introduction of the declarations of the decedent in this class of cases. An examination of which will lead to those holding the opposite view \* \* \* Collagan v. Burns, 57 Me. 449; Lawyer v. Smith, 8 Mich. 411; Weeks v. McBeth, 14 Ala. 474; Patterson v. Hickey, 32 Ga. 156; Steele v. Price, 5 B. Monr. (Ky.) 58; Youndt v. Youndt, 3 Grant (Penn.), 140; Tynan v. Paschal, 27 Tex. 286." See also Card v. Grinman, 5 Conn. 164; Sweet v. Sweet, 1 Redf. (N. Y.) 451; Warner v. Warner, 37 Vt. 356; Harring v. Allen, 25 Mich. 505; Betts v. Jackson, 6 Wend. 173; Reel v. Reel, 1 Hawks Law (N. C.) 248; Finch v. Finch, L. R., 1 P. & D. 371."

8. In Patterson v. Hickey, 32 Ga. 156, the court held that "Where the question is *revocavit vel non*, parol evidence as to the acts and declarations of the testator, is admissible although made at any time between the making of the will and the death of the testator." In New Jersey the rule is to the contrary. Randall v. Beatty, 31 N. J. Eq. 643.

9. In Clark v. Morrison, 25 Penn. St. 453, it was held that since the act of 1833, relating to last wills and testaments, no will in writing concerning *real estate* can be revoked by parol. And in 2 Greenl. Ev. (14th ed.), p. 668, note 3, it is said that "The difference between wills of land and of personal property, in regard to the evidence of revocation as well as the formalities of execution is now admitted in few if any of the United States." Parol evidence is inadmissible to show of itself the revocation of a will; such evidence can only be introduced to explain and show the intention of equivocal acts by the testator, or by his direction, destroying or abrogating his will. Hargroves v. Redd, 43 Ga. 142; Lawson v. Morrison, 2 Am. Lead. Cas. 490; 2 Whart. Ev. sec. 895.

10. In Toebbe v. Williams, 80 Ky. 662, 665, the court said: "Evidence of verbal statements made by the testator, after making his will according to the forms of law, to the effect that he has not made a will do not constitute a revocation and possess but little value, and when permitted to go to the jury they should be instructed that such statements do not tend to prove revocation, and furnish no light in constructing the written acts of the testator."

11. In Miller v. Phillips, 9 R. I. 141, it was held that "Evidence of parol declarations is admissible, to rebut the presumption of revocation from marriage, to be weighed by the jury

in connection with other evidence," and the court say: "The evidence that the testatrix spoke of her will, we think, was properly admitted. Although there was for a time a great conflict of authority on the question, whether parol evidence could be admitted in order to rebut the presumption of revocation, we consider, the weight of authority now to be strongly in favor of its admissibility. It is indeed, to use the words of Sir John Nichol, in *Johnson v. Johnson*, *supra*, the lowest species of evidence, and always to be received with caution; they may be insincere, or the passing thought of a moment, and they may be easily misapprehended and misrepresented; on the other hand, they may be made seriously and deliberately, and upon occasions where great weight should be attached to them. At any rate they are admissible, and to be weighed by the jury in connection with other evidence. *Lugg v. Lugg*, 1 *Ld. Raym.* 441; *Brady v. Cubitt*, 1 *Doug.* 31; *Hall v. Dench*, 1 *Vern.* 329; *Goodtitle v. Otway*, 2 *H. B.* 522; *Hollway v. Clarke*, 1 *Phillim.* 339; and on the point that the verdict is against the weight of evidence, we see no reason for setting it aside."<sup>1</sup>

### Sec. 131. Lost will.

The contents of a lost will may be proved by parol.

This concluding rule is the greatest stretch to which the exceptions to the general rule of parol evidence have been drawn. It is sufficiently established by the celebrated case of *Sugden v. Lord St. Leonards*, 1 *P. Div.* 154, concerning the will of Lord Chancellor Sugden, which establishes the doctrine above stated, and also declares that the contents of the lost will may be proved by a single witness, even if interested. In this case the will was proved by the sole evidence of the daughter of the testator who was largely interested under the will. The declarations of the testator, both before and after the execution, were admitted as part of the evidence. Exceptional weight was attached to Miss Sugden's testimony because she was her father's daily companion, and as Sir James Hannen said, was "his assistant and amanuensis in the preparation of the later editions of his works, and

<sup>1</sup> See also *Denison's Appeal*, 29 *Conn.* 399.

*Converse v. Wales*, 4 *Allen*, 512.

*Turner v. Cheesman*, 15 *N. J. Eq.* 243.

*Johnson's Will*, 40 *Conn.* 587.

*Lawyer v. Smith*, 8 *Mich.* 411.

But see *Deupree v. Deupree*, 45 *Ga.* 415.

The most learned and exhaustive examination and discussion of the subject may be found in *Collagan v. Burns*, 57 *Me.* 449, where opinions on both sides of the question are reported.

she appears to have been always with him on the many occasions on which he dealt with his testamentary papers and dispositions. She had therefore, so to speak, a special training, which put her in a position of much greater advantage than a lady under ordinary circumstances might be expected to occupy. In addition to that, she had ample opportunities of becoming acquainted with the contents of this instrument in particular." Cockburn, C. J., treated the admissibility of the evidence as established by *Brown v. Brown*, 8 E. & B. 876, in which Lord Campbell said: "Parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document," and Chief Justice Cockburn declared that "the consequences of a contrary ruling would be in the highest degree mischievous." Jessel, M. R., said he was "at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed." James, Mellish, and Baggally, JJ., coincided. The doctrine of *Quick v. Quick*, 3 Sw. & Tr. 442, limiting the admissibility of declarations to those made before the execution of the will, was explicitly overruled.

In *Foster's Appeal*, 87 Pa. St. 67; S. C. 30 Am. Rep. 340, the same doctrine was held, the court observing: "That the law will not tolerate any making of a will for him by any other means than his own act in writing duly executed, is clear. But such a will having a legal existence, yet accidentally lost or destroyed, the establishment of its contents is not the making of a new will, but a restoration merely of that which the testator himself made and left behind him to govern his estate. There is no greater sanctity, in this respect, than the restoration, by parol evidence, of other instruments equally solemn and having an equal effect in the disposition of property. The law simply comes in aid of his own legally performed act, to prevent his intentions from being frustrated or defrauded."

In *Wilbourn v. Shell*, 59 Miss. 205; S. C. 42 Am. Rep. 363, to correct spelling in his will already executed, the testator had it copied, and undertook to execute the copy, and destroyed the original. The copy being insufficiently attested, *held*, that the original was restored to force, and its contents were sufficiently established by the copy, with evidence of its correctness and evidence of the testator's declarations.<sup>1</sup>

<sup>1</sup> To same effect, *Matter of Page*, 118 Ill. 576; S. C. 59 Am. Rep. 395.

*Harris v. Harris*, 26 N. Y. 433.  
*Schultz v. Schultz*, 35 N. Y. 653.

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